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No. 91-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JAMES BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS EDUCATION ASSOCIATION,

Respondent,

and

SPRINGFIELD EDUCATION ASSOCIATION,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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January 30, 1992

QUESTION PRESENTED

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986), this Court held that unions seeking to collect compulsory fees from nonmembers are required to establish pre-collection procedures to safeguard the First Amendment right of nonmembers to refrain from supporting the political, ideological and other non-collective bargaining causes of the union. *Inter alia*, *Hudson* requires unions to provide nonmembers with a "certified public accountant's verified breakdown of expenditures." *Id.* at 310.

The question presented is:

1. Does a union satisfy its disclosure requirements under *Hudson* when it fails to provide nonmembers with a certified public accountant's audit verifying its allocation of expenditures into chargeable vs. nonchargeable categories?

LIST OF PARTIES TO THE PROCEEDINGS

The petitioners are James Belhumeur, Peter Anthony, Betsy Ann Wood, Eleanor DuPuis, Clyde Armstrong, Arthur Papandrea, Vere Chappell, Ronald Galluccio, Harry Crane and Anne Garvey.

Other interested parties are Edmund Storlazzi, David DuPuis, Ruby Crane, Kasmir Machowski, Charles Cipollini, Jean-Pierre Anselme, Ben Branch, Robert Davis, John P. Ebersole, Clive Foss, Gerald R. Garrett, Edward R. Harrison, Bruce S. Jacobson, Michael Kreisler, Nelson J. Lacey, Harold P. Mahon, Michael F. Malone, Jose Mestre, Siamak Movahedi, William A. Nash, John D. Palmer, Simon Rottenberg, Lowell M. Schwartz, Larry Seiford, Marguerite Burchell, Richard Carreiro, Lawrence Finnerty, Deborah Flynn, Marial Harper, Sylvia Hebert, Norma Markey, Jeanne Pallatroni, Ellen Shepherd, Helen Whitman, Helene Adams, Sharon Barnett, Elizabeth Beauregard, Raymond J. Beauregard, Mary Burger, Michael Burns, Patricia Burns, Carolyn Canavosio, Nancy S. Carlson, Kenneth E. Cook, Jr., Susan J. Danton, Brian J. Downey, Rayna Ethier, Dennis A. Fenton, Barbara W. Finkel, Jean Z. Flint, Barbara A. Freeman, Deborah Gilbert, Waldo Goodermote, Estelle A. Gross, Elizabeth Karr, Angela Kennedy, Harriet Keogh, Stephen Le Clair, Patricia Le May, Edward Lundrigan, Laura Macphaul, Ellen Manolakis, Martin Manoogian, Maria Mazzaferro, Gerard O'Brien, Nancy Roberts, William E. Sanderson, Margaret Yarmesky, Genevieve Cross, Diane Galluccio, Ann Luchini, James D. Badgio, James Connolly, Robert Davis, John F. Dowd, David E. Elworthy, Hugo Galli, Francis Guiliano, Joseph Gustafson, Richard Herbst, John Mandell, John F. Marzilli, Carol McGrain, Thomas McGrain, Loretta Morelle, Francis Pocaro, Richard Ricciardi and Michael V. Simmarano. All of these interested parties were charging parties below in the related cases.

The respondent is the Massachusetts Labor Relations Commission. Intervening in this case are the National Education Association, the Massachusetts Teachers Association, and ten local affiliated associations (Arlington Education Association,

Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Massachusetts Society of Professors/Faculty Staff Union, New Bedford Education Association, Springfield Education Association, Wareham Education Association, Woburn Teachers Association and the Education Association of Worcester).

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioners James Belhumeur, Peter Anthony, Betsy Ann Wood, Eleanor DuPuis, Clyde Armstrong, Arthur Papandrea, Vere Chappell, Ronald Galluccio, Harry Crane and Anne Garvey respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 411 Mass. 142, 580 N.E.2d 746 (1991), and is reproduced *infra* at 1a as Appendix A. The opinions of the Massachusetts Labor Relations Commission, dated June 1, 1990 and August 8, 1990, are not reported and are reproduced respectively *infra* at 11a as Appendix B and 36a as Appendix C.

JURISDICTION

The opinion and judgment of the Supreme Judicial Court of Massachusetts were entered on November 4, 1991. Pursuant to Rule 13.1, Rules of the United States Supreme Court, this Petition is filed within ninety (90) days of the opinion and judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution says in pertinent part: "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Mass. G.L.c. 150E, § 12 states, in pertinent part:

> The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the

beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed .... The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standard of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, or the

> exclusive bargaining agent or its affiliates and available only to the members of the employee organization.
>
> It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

STATEMENT OF THE CASE

James Belhumeur and over 100 other public employees ("petitioners" or "teachers") filed 159 prohibited practice charges with the Massachusetts Labor Relations Commission ("Commission") against the unions which serve as their exclusive collective bargaining representatives with their employers.[1] All of these exclusive bargaining representatives ("EBR") are affiliated with the National Education Association ("NEA") and the Massachusetts Teachers Association ("MTA"). (These entities will be referred to collectively as "the unions.") The teachers have chosen not to become members of the unions, but the collective bargaining agreements governing their employment require the payment of compulsory "agency fees."

The teachers' prohibited practice charges specifically raised a federal question, by alleging, *inter alia*, that the unions demanded payment of agency fees without first providing them with adequate, useful or "verified" financial information to justify and explain their chargeable vs. nonchargeable cost allocations as

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[1] The ten unions charged with prohibited practices are the Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Massachusetts Society of Professors/Faculty Staff Union, New Bedford Education Association, Springfield Education Association, Wareham Education Association, Woburn Teachers Association and Education Association of Worcester.

required by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).[2] The Commission consolidated those portions of all 159 cases challenging the validity of the unions' financial discloure.[3] On June 1, 1990, the Commission upheld without a hearing, and as a matter of law, the adequacy of the financial disclosure disseminated by seven of the ten EBRs, MTA and NEA.[4]

The teachers filed a timely Request for Review, pursuant to 456 Code of Massachusetts Regulations §15.04 (1990). On August 8, 1990, the Commission reaffirmed its earlier refusal to issue complaints challenging the adequacy of the financial disclosures. On August 27, 1990, the teachers filed a timely Notice of Appeal. To simplify matters before the appellate courts of Massachusetts, the Commission assembled the record in fourteen of the prohibited practice charges which were representative of the 159 charges filed. After notice of assembly of the record in those fourteen cases, the cases were docketed in the Massachusetts Court of Appeals on January 18, 1991. On January 24, 1991, the teachers filed a Request for Direct Appellate Review with the Supreme Judicial Court of Massachu-

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[2] The prohibited practice charges alleged that the "1987–88 and 1988–89 agency fee demands ... violate ... the state and federal constitutional rights of the charging party." Furthermore, in their Briefs to the Labor Commission, petitioners specifically argued that the First Amendment and due process clause, as interpreted by this Court in *Hudson*, were violated by the unions' agency fee demands. (*See* Charging Parties' Brief in Support of Their Challenge to the Validity of the Unions' Financial Disclosure at 2-5.)

[3] In addition to challenging the *validity* of the unions' financial disclosure, the prohibited practice charges also challenged the *amount* of the unions' agency fee demands. The Commission issued complaints on those "amount" challenges, which are being held in abeyance pending the outcome of the instant "validity" challenge.

[4] The Commission did issue complaints challenging the validity of three of the EBRs' financial disclosure—Bridgewater, Fairhaven, and Wareham. Those complaints are being heard separately by the Commission and are not a part of this appeal.

setts, which was granted. Oral argument was held before the Supreme Judicial Court on September 5, 1991, and a judgment was rendered on November 4, 1991.[5]

Statement of the Facts

James Belhumeur and the other teachers are employed in the public primary and secondary schools of Massachusetts or at the University of Massachusetts. These teachers are represented for purposes of collective bargaining by various unions which serve as their EBRs. These EBRs are all affiliated with the Massachusetts Teachers Association and the National Education Association. The EBRs and the teachers' employers have entered into "agency shop" contracts which require all employees to either join the unions or pay compulsory agency fees. The teachers have all chosen to refrain from joining the unions, and object to paying more than their *pro rata* share of the unions' costs of directly funding collective bargaining, contract administration and grievance adjustment with their employer in their bargaining unit.

For two successive academic years, 1987-88 and 1988-89, the unions made formal demands upon the teachers for agency fees. The amount demanded was slightly less than that paid by voluntary union members who are full-time teachers, but more than the amount of dues paid by other voluntary members of the unions.[6]

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[5] The petitioners' Brief to the Supreme Judicial Court also specifically raised the federal issue, to wit: that the unions' demand for an agency fee in the absence of adequate audited financial disclosure violated the rights of the petitioners under *Hudson* and the First Amendment and due process clause. (Brief at 22-27.)

[6] The MTA and the NEA have various categories of membership, of which full–time teachers pay the most in dues.

The agency fee demands were accompanied by various financial reports related to each level of the EBR/MTA/NEA hierarchy.[7] The subject and detail of these various financial disclosures differed dramatically from one union to another. What follows is a brief description of that disclosure, as it relates to the issue presented in this case, to wit: Must a union seeking agency fees provide nonmembers with an independent audit of its agency fee chargeable vs. nonchargeable cost allocations?

A.) *Exclusive Bargaining Representatives' disclosure*: The only materials that the EBRs provided to *specifically justify or explain* their agency fee chargeable vs. nonchargeable allocations were standardized forms entitled "Local Association Agency Fee Explanations." None of these "local association agency fee explanations" was independently audited or subjected to any sort of independent verification.

B.) *MTA's disclosure*: Like the EBRs, MTA provided the teachers with *no* audit of its agency fee chargeable vs. nonchargeable cost allocations. MTA's own CPA admitted that he could have been engaged to "do an audit of the chargeable vs. nonchargeable" allocations. (Eldridge Affidavit at 5.) However, after considering the alleged "cost and burden," MTA decided not to engage its auditor to perform such an audit. (Eldridge Affidavit at 5.)

MTA provided the teachers with an audit of its "basic financial statements," and an opinion letter from the CPA firm of Arthur Young stating that those basic statements were "present[ed] fairly." However, those "basic financial statements" specifically labelled the agency fee chargeable vs. nonchargeable cost allocations as "unaudited," and the "opinion letter" from MTA's auditors stated quite candidly that "we express no opinion" on those portions of the financial data (the agency fee

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[7] The unions have based both their 1987–88 and 1988–89 agency fee demands on their 1987–88 financial data. Thus, the adequacy of the financial disclosure for only 1987–88 is at issue in these cases.

allocations) marked "unaudited."[8] Furthermore, it is undisputed that "basic financial statements" do not encompass, and are not concerned with, agency fee chargeable vs. nonchargeable cost allocations.

C.) *NEA's disclosure*: NEA provided the teachers with an audit of its "basic financial statements," and an opinion letter stating that those basic statements were "present[ed] fairly." The critical information for agency fee payors, the chargeable vs. nonchargeable cost allocations, were *not* subjected to a similar stand-alone audit. Rather, they were presented merely as a "supplemental schedule" to the basic financial statements. A "supplemental schedule" is not a full–blown audit, but rather is exactly what its name implies, a supplement to the "basic financial

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[8] David F. Hawkins, Professor of the Harvard University Graduate School of Business Administration, wrote a detailed affidavit and expert report on behalf of the teachers. Professor Hawkins specializes, and teaches courses, in the analysis of financial statements. In various capacities, Professor Hawkins has been an advisor to the Financial Accounting Standards Board of the American Institute of Certified Public Accountants. According to Professor Hawkins:

> The Massachusetts Teachers' Association's chargeable/non–chargeable cost statement and calculation of its portion of the 1987–88 and 1988–89 agency fee was not verified by an independent auditor. These data are presented in supplemental schedules attached to the Massachusetts Teachers' Association's audited 1987–88 basic financial statements. They are marked "unaudited". The Massachusetts Teachers' Association's auditor's opinion states that the auditor does not express an opinion on those portions of the Massachusetts Teachers' Association's 1987–88 supplemental schedules marked "unaudited". Unaudited agency fee related data attached to audited basic statements are simply the union management's statements and, as such, do not meet the *Hudson* independent auditor verification standard, since no audit was performed on the union management's agency fee related financial representations.

(Hawkins Affidavit at 13.)

statement" audit (which does not even purport to deal with the agency fee issue). This is undisputed.[9]

As the teachers' expert auditing witness described it:

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[9] Statement on Auditing Standards No. 29, the American Institute of Certified Public Accountants' standard governing "supplemental schedules," states that:

> When reporting [on supplemental schedules] the measurement of materiality is the same as that used in forming an opinion on the basic financial statements taken as a whole. *Accordingly, the auditor need not apply procedures as extensive as would be necessary to express an opinion on the information taken by itself.*

Id. at 4 (emphasis added).

The careful crafting of the auditors' "opinion letter" to the NEA bears this out.

> To the Executive Committee and Members
> of the National Education Association
> of the United States
>
> Our report on the audit of the financial statements of the National Education Association of the United States as of August 31, 1988 and for the year then ended appears on page 1. This audit was conducted [*only*] for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying Schedules of Agency Fee Chargeable and Nonchargeable Expenditures are presented for purposes of additional analysis and are not a required part of the basic financial statements. Such information has been subjected to [*only*] the auditing procedures applied in the audit of the basic financial statements and, in our opinion, is fairly stated in all material respects [*only*] in relation to the basic financial statements taken as a whole.
>
> /s/ Coopers & Lybrand

(Emphasis added.)

> The typical role of supplemental schedules is to give statement users the opportunity to undertake additional analysis beyond that provided by the basic financial statements. The basic financial statements are the focal point of the presentation. In contrast, the basic financial statements are *not* the center of interest for fee payors. Fee payors are primarily concerned with chargeable cost information. For them, the "supplemental" information *is* the focal point.

(Hawkins Affidavit at 15 (emphasis in original).)

In contrast to what NEA disseminated here, other large national unions, including affiliates of NEA's smaller competitor (the American Federation of Teachers), disseminate to nonmembers separate and specific audits verifying their agency fee chargeable vs. nonchargeable cost allocations.

Decisions Below

The Massachusetts Labor Relations Commission agreed with the teachers that "[f]or the purposes of a fee payer who must decide whether or not to object to the fee, the critical factor is the union's chargeability determinations, which implicate the fee payer's First Amendment rights ...." (Appendix ("App.") B at 16a.) However, the Commission refused to require independent audits of this "critical" agency fee information. The Commission opined that such audits, while containing "critical" information, would be merely an "additional burden" on the unions. (App. B at 16a.)

On direct appellate review, the Supreme Judicial Court affirmed the Commission's decision. (App. A at 1a.) As a factual matter, the Court recognized that if the unions disseminated an audit of their chargeable vs. nonchargeable cost allocations, "agency service fee payers would be more apt to accept a union's

expense allocations than in the absence of such an audit, and presumably fewer proceedings would be brought to resolve challenges to expense allocations." (App. A at 5a.)

However, the Court then opined that:

> [t]he crucial question is not, however, whether an independent audit would be a good idea, but rather whether the First Amendment rights of agency service fee payers can be protected only if a report of such an independent audit accompanies a union's demand for payment of an agency service fee. The language in *Chicago Teachers Union* v. *Hudson* does not explicitly require such a practice. The uncertain language ... provides no guidance to the resolution of the issue before us. ... [T]he language of the *Hudson* opinion is inconclusive ....

(App. A at 5a-6a, citations and footnote omitted.)

Thus, based upon what it found to be "uncertain" and "inconclusive" language from this Court, the Supreme Judicial Court of Massachusetts held that an independent audit of the unions' chargeable vs. nonchargeable cost allocations was not constitutionally necessary.

Conclusion

In short, the record supports the following facts:

a.) direct audits of the unions' agency fee chargeable vs. nonchargeable cost allocations can be properly performed by certified public accountants (*see* Eldridge Affidavit at 5; *see also* Decision of the Supreme Judicial Court, App. A at 4a-5a);

b.) such audits provide "critical information" to the nonmembers (*see* Decision of the Massachusetts Labor Relations Commission, App. B at 16a);

c.) such audits would help nonmembers protect their First Amendment rights and also reduce litigation (*see* Decision of the Supreme Judicial Court, App. A at 5a); and

d.) such audits would not be excessively costly or burdensome for the unions (*see* Hawkins Affidavit at 17).

REASONS FOR GRANTING THE WRIT

I: ***Even while recognizing that it would likely be a "good idea," the lower court refused to require an audit of the unions' chargeable vs. nonchargeable cost allocations because it found this Court's decision in* Hudson *"inconclusive" and "uncertain" on this point.***

The Supreme Judicial Court of Massachusetts recognized that it could be a "good idea" for unions to provide agency fee payors with audits of their chargeable vs. nonchargeable cost allocations, because this would inject some certainty into the fee collection process and lessen the amount of litigation. (App. A at 5a-6a.) Under the traditional First Amendment analysis used in *Hudson* and other free speech cases, this finding alone should be determinative, particularly where, as here, there is no objective evidence showing that it would be burdensome or difficult for the unions to obtain and disseminate such independent audits.[10]

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[10] In *Hudson*, this Court recognized that the mere existence of an "agency shop [arrangement] is 'a significant impingement on First Amendment rights,'" 475 U.S. at 301 & n.8, 307 n.20 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). And, in virtually every context imaginable, this Court has **[cont.]**

Notwithstanding its belief that it might be a "good idea" for the unions to provide better disclosure and more assurance to the fee payers that the amount of money about to be seized from their paycheck was not arbitrarily calculated, the lower court refused to require audits of the unions' chargeable vs. nonchargeable allocations largely because it felt that *Hudson* was "inconclusive" and "uncertain" about the meaning of "verification by an independent auditor." (App. A at 5a-6a.) We submit that the lower court erred in this narrow reading of *Hudson*, a case which broadly protected nonmembers' procedural and substantive rights to refrain from supporting political and ideological activities that they found repugnant.[11]

While the unions engaged auditors to perform audits of their "basic financial statements" (which are used for internal union

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recognized that infringements on First Amendment rights only may be justified "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive" of First Amendment freedoms. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *accord*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Boos v. Barry*, 485 U.S. 312, 321-22 (1988). The Supreme Judicial Court of Massachusetts did not follow these dictates when it refused to require that which it believed to be a "good idea" for the protection of employees' First Amendment rights.

[11] The Massachusetts court also reasoned that the escrow arrangement in this case lessened the need for audited disclosure concerning the fee collections, since "the agency service fee is not paid to the union until the challenge is resolved ...." (App. A at 8a.) This precise rationale has been rejected both by this Court and several federal courts. *See Hudson*, 475 U.S. at 309-10; *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988); *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir. 1991); *see also Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987) (one purpose of *Hudson*'s financial disclosure requirement is to provide some pre-collection assurance that the amount of money about to be seized from agency fee payors has been accurately calculated and verified, and is not merely the unions' self-serving calculation). Escrow of the disputed fees does not lessen the requirement of adequate and accurate *pre*-collection financial disclosure and audits mandated in *Hudson*.

budgeting purposes only and are devoid of agency fee chargeability information, *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989)), they wilfully refrained from engaging their auditors to audit the only information of critical importance to the nonmembers: the chargeable vs. nonchargeable cost allocation information. Even though required to "facilitate a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307-08 n.20, the unions failed to provide the nonmembers with an audit to verify the agency fee allocation information found to be "critical" by the Massachusetts Labor Relations Commission. (App. B at 16a.) Particularly where it has been shown to be a "good idea" to provide such an audit of these critical chargeability allocations to protect constitutional rights, the First Amendment and this Court's jurisprudence cannot be construed to allow its omission. *Hudson*, 475 U.S. at 304-06; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Where, as here, there clearly exists *better* and *nonburdensome* alternatives to protect the constitutional rights of the agency fee payors (i.e., requiring an audit of the agency fee chargeable vs. nonchargeable allocation statements), use of lesser standards is not consistent with *Hudson*, 475 U.S. at 302-03 and nn.9, 11, 12, and *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984).

Overemphasizing some *dicta* from this Court, the unions will likely argue, as they always do, that "absolute precision in the calculation of the charge" is not required, citing *Hudson*, 475 U.S. at 307 n.18. However, the effect of the lower court's decision is that *NO* precision is required in the "financial disclosure" phase of the agency fee collection process (and *none* was provided to the teachers here, particularly for the EBRs and the MTA). That the fee need not be calculated with "absolute precision" does not give unions *carte blanche* to calculate it *imprecisely* and give nonmembers unaudited and unreliable disclosure on the critical chargeable vs. nonchargeable cost allocations.

After *Hudson*, there is no principled basis for allowing a union to disclose financial information which provides less

assurance than is readily possible that the agency fee allocation information is fairly calculated.[12]

In short, the Supreme Judicial Court of Massachusetts failed to recognize this because it found this Court's decision in *Hudson* to be "uncertain" and "inconclusive." This Petition should be granted to clear up the confusion which the Massachusetts' court (and several other lower courts) have found to exist concerning *Hudson*'s financial disclosure requirements.

II: ***The decisions of the lower courts are divided in interpreting what this Court meant when it required a union's agency fee disclosure to be "verifi[ed] by an independent auditor." This case presents the Court with a complete record of expert auditing testimony to determine what financial disclosure must be audited in order to "facilitate a nonunion employee's ability to protect his right" to refrain from supporting a union's political and non-collective bargaining agenda.***

Hudson used the phrase "verification by an independent auditor" interchangeably with the term "independent audit." *Compare Hudson*, 475 U.S. at 307 n.18 *with id.* at 310 & n.23. Despite that apparent clarity of meaning, since the decision in *Hudson* the lower courts have divided over the question of which union financial statements ("basic financial statements" or statements of agency fee chargeable vs. nonchargeable allocations) must be audited to comply with *Hudson*'s "verification by an independent auditor" requirement. The Supreme Judicial

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[12] This Court has never indicated that there is an "agency fee exception" to its traditional "carefully tailored" standard. On the contrary, it has applied that standard at least twice in the agency fee context. *See Ellis*, 466 U.S. at 443-44; *Hudson*, 475 U.S. at 303 & nn.11, 12 (the Court relied on *Roberts*, *Elrod*, *Kusper*, *Button*, and several scholarly commentators for the conclusion that "the First Amendment requires that the procedure [for determining agency fees] be carefully tailored to minimize the infringement" on nonmembers' constitutional rights). In permitting a lower level of disclosure, the decision below conflicts with *Ellis* and *Hudson*.

Court found *Hudson* to be "inconclusive" and "uncertain" on this issue.

The Massachusetts court below recognized the split of authority which has developed among the federal courts on this issue, comparing *Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989) and *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. 511, *further proceedings*, 744 F. Supp. 938 (C.D. Cal. 1990), *with Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1810 (1990), *Andrews v. Education Association*, 829 F.2d 335 (2d Cir. 1987), *Ping v. National Educ. Ass'n*, 870 F.2d 1369 (7th Cir. 1989) and *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991). (App. A at 3a-4a & n.3.)

In *Hohe*, the district court determined that the financial information disclosed to nonmembers did not satisfy *Hudson*'s "verification" requirement because the agency fee breakdown, as opposed to the "basic financial statements," was not audited. *Hohe* recognized that an audit of "basic financial statements," which does not concern chargeable vs. nonchargeable breakdowns, is irrelevant to agency fee payors and cannot by itself comply with *Hudson*. Only a separate audit of the breakdown of expenditures into chargeable and nonchargeable categories suffices under *Hudson*:

> The [unions] further argue that the Supreme Court in *Hudson* meant verification to mean an examination of the basic financial statements under generally accepted auditing standards appropriate under the circumstances. ... We disagree. ... The whole point of providing the notice of nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require a breakdown between chargeable and nonchargeable costs. The Supreme Court has said that the necessary disclosure must include verification by an independent auditor. Hence, it must have meant verification of the breakdown. Verification of the basic financial statements occurs too early in the

> process to be of help. It would not provide any reassurance concerning the allocation of costs and enable a nonmember to decide whether to contest the fee or not.

Hohe, 727 F. Supp. at 167.

That is essentially the teachers' position in this case, a position that is wholly supported by the extensive accounting testimony in the record. Because the unions' "basic financial statements" contained *no* information as to chargeability allocations, the testing of those statements—no matter how detailed—here, as in *Hohe*, "would not provide any reassurance concerning the allocation of costs and enable a nonmember to decide whether to contest the fee or not." *Id.*

Hohe recognized the obvious due process basis for *Hudson*'s "independent verification" requirement: that nonmembers are entitled to some sort of independent, pre-collection check to insure that the union's reduced fee calculations are reasonably accurate, and not just plucked out of the air for self-serving purposes. *Hudson*, 475 U.S. at 306-07, 304 n.13; *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *see also Brock v. Roadway Express*, 481 U.S. 252, 264-65 (1987), *citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (before even a *temporary* loss of property can be permitted, the deprived party must receive adequate pre–deprivation protections, even if he will ultimately have a full post-deprivation evidentiary hearing). These due process "pre-deprivation assurance" factors are particularly important where, as here, not just "property," but *core* First Amendment rights are at stake. *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, 111 S. Ct. 1950, 1957-58 (1991); *Hudson*, 475 U.S. at 304 n.13; *Ellis*, 466 U.S. at 445-48.

Similarly, in *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. at 514-15, the district court was presented with virtually the identical factual record that exists in this case, and specifically recognized that only audits of the chargeable vs. nonchargeable calculations, as opposed to mere audits of the "basic financial statements," effectively insure charging parties'

right to pay only an accurately calculated agency fee. *Mitchell*, 739 F. Supp. at 515, also criticized and distinguished the holdings in both *Ping* and *Gwirtz*, as did the Massachusetts court below. (App. A at 4a-5a ("[the reasoning used in *Gwirtz*, *Andrews*, *Ping* and *Dashiell*] for rejecting ... an audited verification of the allocation of chargeable and nonchargeable expenses is not dispositive of the issue")).

In contrast, other federal courts have not required independent audits of a union's chargeable vs. nonchargeable cost allocations, albeit for varying and inconsistent reasons. For instance, in *Andrews* and *Ping*, two circuits held, *without the benefit of any expert auditing testimony*, that the role of the auditor was merely to verify the union's "basic financial statements," rather than the union's allocation of expenses into chargeable vs. nonchargeable amounts. Those courts held that auditors cannot verify a union's allocation of expenses into chargeable vs. nonchargeable amounts because, they reasoned, auditors cannot "make the legal determination" of what is chargeable and what is not. *Andrews*, 829 F.2d at 340; *Ping*, 870 F.2d at 1374; *cf. Mitchell*, 739 F. Supp. at 515 n.7; App. A at 4a-5a.[13] *Andrews* and *Ping* were wrong, both factually and legally.

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[13] *Mitchell* cogently disposes of the argument that auditors "cannot" audit a union's statement of chargeable vs. nonchargeable cost allocations because to do so would require them to make "legal" determinations.

> An auditor is not required to make any legal determinations regarding a union's allocation between chargeable and non-chargeable expenses. All the auditor need do is verify that the expenditures made by the union were indeed actually made and verify that they have been allocated in accordance with certain disclosed criteria. Allocation of expenses in accordance with stated criteria is not unfamiliar to outside auditors. It is a routine part of their professional services.

739 F. Supp. at 515 n.7; *cf. Andrews*, 829 F.2d at 340; *Ping*, 870 F.2d at 1374.

The extensive expert testimony in this case shows quite clearly what auditors can properly do in the area of agency fee auditing: the MTA's own auditor *admitted* that he could have been engaged to audit, in full accord with Generally Accepted Auditing Standards, the breakdown of the union's chargeable vs. nonchargeable calculations, if only the union had engaged him to do so. (Eldridge Affidavit at 5.) There is not even a hint in this record that an engagement to audit agency fee chargeability allocations, if requested, would have improperly required the auditor to cross over the line into making "legal determinations." In fact, the Massachusetts Supreme Judicial Court recognized the error of the *Andrews* and *Ping* rationale, stating that:

> This reason for rejecting a constitutional challenge to the absence of an audited verification of the allocation of chargeable and nonchargeable expenses is not dispositive of the issue. Pursuant to proper guidelines founded on established legal considerations, an auditor could probably do a satisfactory job of properly separating chargeable from nonchargeable expenses.

(App. A at 4a-5a.)

Thus, while *Andrews* and *Ping* are contrary to the positions urged by the teachers here, their reasoning is insupportable as a matter of both fact and law. *See Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989).

The lower court also cited *Gwirtz* as having ruled against the teachers' position, but it failed to note that the precise issue in *Gwirtz* was not whether an audit of the union's chargeable vs. nonchargeable allocations was required at all, but rather, whether a mere "supplemental schedule" engagement was a sufficient form of audit service. App. A at 4a n.3; *see Mitchell*, 739 F. Supp. at 515, which distinguished *Gwirtz* on this very ground. *Gwirtz* never addressed the specific issue raised herein, particularly as it relates to the disclosure proffered by the MTA and the EBRs.

Furthermore, at least one judge on the Sixth Circuit has expressed dissatisfaction with the *Gwirtz* ruling. *See Cramer v. Matish*, 924 F.2d 1057 (6th Cir. 1990) (Table), *reprinted at* 1990 WL 169640 (Wellford, J., concurring in part and dissenting in part). Judge Wellford's opinion in *Cramer* specifically recognizes that other Sixth Circuit cases are hopelessly in conflict with *Gwirtz*. *Compare Tierney v. City of Toledo*, 824 F.2d 1497, 1503-04 (1987), *further proceedings*, 917 F.2d 927 (6th Cir. 1990) *and Damiano v. Matish*, 830 F.2d at 1369-70, *with Gwirtz*.

Finally, while the Fourth Circuit's decision in *Dashiell v. Montgomery County* is cited as adverse to the teachers, the court there ruled that:

> [I]n its initial explanation to nonunion employees, the union must break its expenses into major descriptive categories and disclose those categories or portions thereof which it is including in the fee to be charged. *Hudson* also requires that the financial data be verified by an independent auditor. The verification requirement compels the union to have an independent auditor determine whether the amounts claimed by the union for *chargeable* activities are true.

925 F.2d at 756 (emphasis added). This requirement is quite similar to that sought by the teachers in this case, although the Fourth Circuit, at a later point in the opinion, also stated that "we reject the suggestion that we require the auditor to review the Union's initial allocation decision. *Id.*[14]

In sum, it is impossible to reconcile the decisions of the lower courts as to the nature of the independent verification required by *Hudson*. *See, e.g., Lowary v. Lexington Local Bd. of*

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[14] *Dashiell*, like Judge Wellford in *Cramer v. Matish*, 924 F.2d 1057 (6th Cir. 1990) (Table), *reprinted at* 1990 WL 169640, recognized the apparent conflict among Sixth Circuit panels over this issue. 925 F.2d at 755, comparing *Gwirtz*, 887 F.2d at 682 n.3 *with Tierney v. City of Toledo*, 917 F.2d at 937 n.7.

Educ., 704 F. Supp. 1430, 1444 (1987), *reconsidered*, 704 F. Supp. 1456, 1460-63 (N.D. Ohio 1988) (district court vacates its own holding concerning the role of the auditor under *Hudson*). This Court should grant certiorari to end this confusion. *See, e.g.*, *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974) (certiorari granted where district courts had taken conflicting positions on an important issue).

CONCLUSION

In the context of compulsory agency fee seizures, this Court needs to clarify what is meant by "verification by an independent auditor." The Supreme Judicial Court of Massachusetts found *Hudson* to be "inconclusive" and "uncertain" on the precise issue presented, and many other courts appear to agree. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 30, 1992

APPENDICES

APPENDIX A

OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

November 4, 1991

[1]S-5590 S.J.C.

JAMES BELHUMEUR & others[1] vs. LABOR RELATIONS COMMISSION & others, interveners.[2]

Suffolk. September 5, 1991. - November 4. 1991.

Present: Liacos, C.J., Wilkins, Abrams, Nolan, Lynch, O'Connor, & Greaney, JJ.

Labor, Union agency fee. Constitutional Law, Labor, Union.

Appeal from a decision of the Labor Relations Commission.

The Supreme Judicial Court granted a request for direct appellate review.

Glenn M. Taubman of Virginia (Deidre Rosenberg with him) for the plaintiffs.

Jean Strauten Driscoll for Labor Relations Commission.

Brian A. Riley for Massachusetts Teachers Association & others, interveners.

Michael D. Simpson of the District of Columbia, for National Education Association, intervener, submitted a brief.

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[1] Each of the ten plaintiffs teaches in a public school in the Commonwealth or at the University of Massachusetts, is represented by a union for collective bargaining purposes, but has not become a union member. The challenges were consolidated for investigation by the Labor Relations Commission.

[2] Springfield Education Association and similar associations in the municipalities of Arlington, Bridgewater, Chicopee, Fairhaven, New Bedford, Wareham, Woburn and Worcester and the Massachusetts Society of Professors/ Faculty Staff Union. Each of these interveners is affiliated with the National Education Association and the Massachusetts Teachers Association, each of which is also an intervener. Expenses of these latter associations are reflected in the agency service fees in dispute in this case.

WILKINS, J. The plaintiff teachers have challenged the amount and validity of the agency service fees charged to them by the unions that represent them for collective bargaining purposes. This appeal relates to one aspect of that challenge. **[2]** We allowed the plaintiffs' petition for direct appellate review.

Each plaintiff argues, as a nonunion member obliged to pay a "service fee" (G. L. c. 150E, § 12 [1990 ed.]), that his or her First Amendment rights have been violated because no independent auditor has certified to the correctness of the allocation of chargeable and nonchargeable expenses, on the basis of which each union determined the agency service fee it charged. The plaintiffs contend that a report of such an independent audit must be delivered to them with the union's demand for payment of an agency service fee. They rely on what the Supreme Court said in Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), particularly in footnote 18 of that opinion. They also assert that State constitutional principles support their claim. None of the intervener unions obtained independent audits of their determinations of which expenses were chargeable and nonchargeable. For the purposes of this appeal, we may assume

that the unions otherwise provided adequate information to their agency service fee payers.

We affirm the commission's determination to dismiss the plaintiffs' charges and not to issue complaints on them insofar as those charges are based on the absence of an independently audited verification of a union's separation of chargeable from nonchargeable expenses.

1. We turn first to the plaintiffs' claim that their First Amendment rights entitle them to an independent audit verification of the union's determination of the expenses that [3]are chargeable to them as agency service fee payers. That position has been rejected in every Federal Circuit Court of Appeals that has passed on it. See Andrews v. Education Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987); Dashiell v. Montgomery County, 925 F.2d 750, 754-757 (4th Cir. 1991); Gwirtz v. Ohio Educ. Ass'n, 887 F.2d 678, 680 (6th Cir. 1989), cert. denied, 110 S. Ct. 1810 (1990); Ping v. National Educ. Ass'n, 870 F.2d 1369,

1374 (7th Cir. 1989).[3] See also Antry v. Illinois Educ. Labor Relations Bd., 195 Ill App. 3d 221, 243 (1990); Kuehn v. American Fed'n of State, County & Mun. Employees, Council No. 65, 435 N.W.2d 130, 135 (Minn. Ct. App.), cert. denied, 110 S. Ct. 145 (1989).

Each Court of Appeals opinion appears to give weight to the fact that, under the auditing process advocated by the challenging agency service fee payers, auditors would be rendering legal opinions as to the propriety of a union's allocation of certain expenses to the chargeable and nonchargeable categories. See Andrews, supra at 340; Dashiell, [4]supra at 756; Gwirtz, supra at 682 n.3; Ping, supra at 1374. This reason for rejecting a constitutional challenge to the absence of an audited verification

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[3] Two United States District Courts have reached a contrary conclusion. See Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938, 940-941 (C.D. Cal. 1990); Hohe v. Casey, 727 F. Supp. 163, 167 (M.D. Pa. 1989). The Mitchell opinion did not acknowledge the contrary views stated in the three previously released Circuit Court of Appeals opinions cited above. In an earlier opinion in the same case, the judge had misread the Gwirtz case to state that there the union had presented an audited breakdown between chargeable and nonchargeable expenses. See Mitchell v. Los Angeles Unified Sch. Dist., 739 F. Supp. 511, 515 (C.D. Cal. 1990). The Hohe court concluded that, in requiring a verification by an independent auditor, the Supreme Court must have meant verification of a union's breakdown between chargeable and nonchargeable expenses. Hohe v. Casey, supra.

of the allocation of chargeable and nonchargeable expenses is not dispositive of the issue. Pursuant to proper guidelines founded on established legal considerations, an auditor could probably do a satisfactory job of properly separating chargeable from non-chargeable expenses. If that were done, agency service fee payers would be more apt to accept a union's expense allocations than in the absence of such an audit, and presumably fewer proceedings would be brought to resolve challenges to expense allocations. Even such a process, however, would not foreclose challenges to unions' classifications of expenses. These challenges to allocations would generally involve legal issues.

The crucial question is not, however, whether an independent audit would be a good idea, but rather whether the First Amendment rights of agency service fee payers can be protected only if a report of such an independent audit accompanies a union's demand for payment of an agency service fee. The language in Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 307 n.18 (1986), does not explicitly require such a

practice.[4] The uncertain language of footnote 18 provides no [5]guidance to the resolution of the issue before us.

If, as we think, the language of the Hudson opinion is inconclusive, the issue remains whether the First Amendment rights of agency service fee payers can be protected only if the union's chargeable and nonchargeable expense allocations are independently audited. An audit of major categories of expenses should tend to assure nonmembers that the union indeed did incur the expenses on which the agency fee was based. Certain audited categories will have expenses all of which are obviously chargeable. Perhaps others will have expenses that are equally clearly not chargeable. The audits conducted in this case meet the plaintiffs' demands as to those two classes of categories. The focus of dispute is on those categories in which some expenses are chargeable and some are not.

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[4] Footnote 18 says in part that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." The requirement stated in that footnote of "verification by an independent auditor" does not tell us clearly what it is to be verified. It seems to be merely verification of "the major categories of expenses," and, if so, that requirement does not aid the plaintiffs' argument for an independent audit separating chargeable and nonchargeable expenses within categories of expenses.

An independent audit of a union's allocation of expenses in these mixed categories is not required in order to protect the plaintiffs' First Amendment rights. The information that the union must provide under the Hudson opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined. Information from an audit of chargeable and nonchargeable expenses might be helpful in making that decision, but it would not be conclusive, and in our [6]judgment is not necessary to provide the First Amendment protections considered in the Hudson case.

The major threatened First Amendment impropriety that the Supreme Court has identified is the use of agency service fee payers' funds to support political candidates and legislative lobbying or to subsidize other political union activities, outside the union's duties as exclusive bargaining agent. See Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1960-1961 (1991); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977). The infringement that an agency shop makes on non-union employees'

constitutional rights requires that carefully crafted procedures be developed to minimize that infringement and to give an individual "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 (1986). Because the disputed portion of an agency service fee is not paid to the union until the challenge is resolved, there is no way by which the union can use a protestor's funds for impermissible purposes.

2. The plaintiffs argue that the Constitution of the Commonwealth requires an independent audit of a union's expense allocations. This argument is presented in less than two pages of their brief.[5] Our previous opinions in this general area [7]have not been based on State, as opposed to Federal, constitutional principles. See Harrison v. Massachusetts Soc'y of Professors/Faculty Staff Union, 405 Mass. 56 (1989); Lyons v.

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[5] The plaintiffs state that the union's governmentally granted power to seize agency fees is limited by arts. 1, 10-12 (due process), arts. 6 and 7 (no special privileges), and art. 16 (free speech) of the Declaration of Rights. They cite certain opinions in which we have acknowledged the existence or possibility of different results under the Constitution of the Commonwealth than under the Constitution of the United States.

Labor Relations Comm'n, 397 Mass. 498, 503 (1986); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70 (1982).

The plaintiffs have made no reasoned argument that this court should recognize a State constitutional right to an independent audit of a union's chargeable and nonchargeable expenses. They do not argue that the use of accounts to hold contested amounts in escrow while the dispute is being resolved is unconstitutional under the State Constitution. They do not claim that the procedure established by the Labor Relations Commission to resolve disputes over the calculation of agency service fees is unconstitutional because of the financial burden placed on a successful challenger to a union's expense allocation determination. In short, the plaintiffs presume, without discussion, that the State Constitution fully and exactly requires the processes that have been adopted in response to Federal constitutional principles and that one additional element is required by the State Constitution.

We reject a State constitutional argument that does not stand on a State constitutional foundation. We are unreceptive

to an unexplicated argument that a State constitutional requirement should be grafted onto a process that has been [8]formulated exclusively in response to Federal constitutional requirements. Here the plaintiffs have not identified a State constitutional right infringed by the absence of an independent audit of the sort they want that could not be adequately protected in some other way. We do not find in their abbreviated, facial challenge to the absence of an independent audit an argument that calls for a decision of this court on their State constitutional claim.

3. We affirm the decision of the Labor Relations Commission dismissing the plaintiffs' claim that each union's explanation of the basis for its agency service fee violated the plaintiffs' constitutional rights because the union's breakdown of expenses was not verified by an independent audit.

So ordered.

APPENDIX B

OPINION OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

June 1, 1990

[1] [Letterhead omitted in printing]

June 1, 1990

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RE: Springfield Education Association/MTA/NEA, et al.,
Case No. ASF-2143, et al.[1]

Gentlemen:

Please be advised that the Commission, Chairman Edgar and Commissioner Boyer participating, decided to dismiss certain portions of the charges of prohibited practice filed in the above-

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[1] This consolidated probable cause determination applies to all cases listed in the attached Appendix of Cases. To the extent that particular issues have not been raised in all cases, the affected cases are identified where appropriate.

captioned cases that challenge the validity of demands for payment [2]of an agency fee based upon the alleged inadequacy of the information provided to the Charging Parties with the demands for the fee, the alleged untimeliness of the demands, and other validity issues pertaining only to certain cases.

These cases concern agency fee demands for the 1987-88 and 1988-89 school years by local unions affiliated with the National Education Association (NEA) and the Massachusetts Teachers Association (MTA). Six of the local unions (Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Educators' Association, Massachusetts Society of Professors/Faculty Staff Union and Woburn Teachers' Association) demanded agency fees only for the 1988-89 school year. Four local Unions (New Bedford Educators' Association, Springfield Education Association, Wareham Education Association and Education Association of Worcester) demanded agency fees for the 1987-88 and 1988-89 school years. The demands indicated that the total amount of the service fee was to be allocated in particular amounts among the local union, the MTA and the NEA.

Sufficiency of Hudson Information

The Charging Parties challenge the validity of the demands made by the Respondent Unions based upon the alleged insufficiency of the financial information provided to them with the demand for payment of the agency fee.[2] Citing the United States Supreme Court decision in Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 307 n. 18 (1985), which stated that

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[2] The financial information provided nonmembers by the local unions, the MTA, and the NEA, included 1987-88 basic financial statements of assets, liabilities, revenues, expenses and cash flows; a breakdown of total expenditures into either chargeable and nonchargeable categories; and an explanation of the calculation of the NEA, MTA, and local union portions of the 1987-88 and 1988-89 agency fees. The Unions have based the 1988-89 fee as well as the 1987-88 fee upon 1987-88 financial data.

"adequate disclosure would include the major categories of expenses, as well as verification by an independent auditor," the Charging Parties argue that the demands for payment of an agency fee must indicate, as part of the calculation of each portion of the fee (NEA, MTA and locals), that the chargeable and nonchargeable expenditure breakdowns (or cost allocations) for each major category of expenses were audited by an independent certified public accountant. They contend that the demands are invalid because the Unions failed to comply with this alleged constitutional prerequisite for the collection of the agency fee: in the case of the MTA and the locals, there was no "verification by an independent auditor" of the chargeable and nonchargeable cost allocations, and, in the case of the NEA, the verification of those allocations was accomplished under an inadequate accounting procedure.

[3]The Charging Parties note that, since the Supreme Court's decision in Hudson, lower courts have disagreed about the meaning of the requirement of "verification by an independent auditor."[3] The Charging Parties criticize decisions, such as that of the Second Circuit Court of Appeals in Andrews v. City of Cheshire, 829 F.2d 335 (1987), which have held that unions need not engage auditors specifically to audit the union's allocations of expenses into chargeable and nonchargeable categories. The Charging Parties believe that an audit of the Unions' basic financial statements does not satisfy the constitutional concern that fee payers be given sufficient information to gauge the propriety of the fee, as required by Hudson. They

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[3] For example, the Charging Parties argue that the Sixth Circuit Court of Appeals has required that an independent auditor verify that the union did expend the amounts claimed for the various categories of activities or expenses, both chargeable and nonchargeable. See Lehnert v. Ferris Faculty Associaion-MTA-NEA, 893 F. 2d 111 (6th Cir. 1989); Tierney v. City of Toledo, 824 F. 2d 1497, 1503-04 (6th Cir. 1987); Damiano v. Matish, 830 F. 2d 1363, 1369-70 (6th Cir. 1987); cf. Gwirtz v. OEA, 887 F. 2d 678 (6th Cir. 1989), cert. denied, __ U.S.__, 58 USLW 3654 (1990) (holding that, contrary to the fee payers' argument, a SAS 29 audit satisfied the Tierney-Damiano audit requirement). See also Hohe v. Casey, 727 F. Supp. 163 (M.D. Pa. 1989).

claim that an audit of the Unions' allocations of their expenditures into chargeable and nonchargeable categories is the only "useful" information for fee payers, as contemplated by the decision of the Supreme Judicial Court in Harrison v. Mass. Society of Professors, 405 Mass. 56 (1989). The Charging Parties state that the allocation of union expenditures into chargeable and nonchargeable categories does not require the auditor to make a "legal determination" about what is or is not a chargeable expense. Rather, they contend that the auditor would be verifying whether the Unions' chargeable/nonchargeable cost allocations are fairly stated in all material respects (i.e., supported by sufficient evidential material) in order to enable the fee payer to decide whether to object to the fee. Thus, in reviewing the cost allocations, the auditor would be engaging in a proper and regular auditing practice consistent with the standards of the profession. Finally, the Charging Parties assert that, in view of the different approaches taken by the courts concerning the Hudson requirements of "verification," the Commission should find probable cause to believe that the Unions failed to disclose adequate financial information and issue a Complaint of prohibited practice to allow for development of a full record and a decision on the merits.

The investigation revealed the following evidence regarding the information the Unions supplied with their demands. The NEA procedure for the allocation of expenditures into chargeable and [4]nonchargeable categories consisted of a review of activities and expenditures for the previous year by the directors of the NEA's programmatic areas, who then allocated them into chargeable and nonchargeable categories pursuant to guidelines from the NEA's attorneys. The allocations made by the area directors were then totaled by the NEA Internal Auditor to derive the cumulative chargeable/nonchargeable expenditures and prepare the Supplemental Schedules to the Basic Financial Statements. These Supplemental Schedules, which contained a breakdown of the NEA's chargeable and nonchargeable expenditures, were submitted to the accounting firm of Coopers and Lybrand for auditing pursuant to SAS 29. Specifically, the auditors reviewed time sheets, vouchers, projects, publications,

surveys, and documentation used by the programmatic area directors to make the chargeable/nonchargeable allocations. The auditors verified that the programmatic area directors followed the NEA legal guidelines in making the chargeable/nonchargeable allocations. The SAS 29 audit required a lower threshold of materiality in the data underlying the Supplemental Schedules in order to reach an opinion on the assertions set forth in those schedules than would have been required had the auditors performed an SAS 62 "Special Report"-type audit.[4]

For the MTA portion of the fee, the accounting firm of Arthur Young audited the Basic Financial Statement but did not audit the MTA's actual allocation of expenses into chargeable and nonchargeable categories. Although several of the local unions provided audits of the previous year's receipts and disbursements, none of these audits purported to review the local's allocation of expenses into chargeable and nonchargeable categories.

In Malden Education Association, 15 MLC 1429, 1435-36 (1989), the Commission held that a union would satisfy the Hudson information requirement if the fee payers receive assurances that the union's basic expenditure information is trustworthy -- [5]supplied by a normal audit of an organization's financial statements -- together with a brief explanation of the basis for the union's claim that certain expenditures were

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[4] The Charging Parties argue that a "higher level" SAS 62 audit should be required when a union must report on a specified element of its financial statements, such as chargeable and nonchargeable expenditure allocations. The Charging Parties submitted the affidavit and expert report of Professor David F. Hawkins of the Harvard University Graduate School of Business Administration, who asserts that "[t]he Hudson verification standard can only be satisfied by subjecting the chargeable/nonchargeable cost statements and agency fee calculations of the ten local associations and the [MTA] and [NEA] to a SAS 62 'Special Report'-type audit performed by an independent certified public accountant." The American Institute of Certified Public Accountants periodically issues "statements of auditing standards" (SAS) which detail requirements for different levels of audit.

constitutionally chargeable. The Commission noted that the purpose of these disclosures is to enable a fee payer to decide whether or not to object to paying the fee. In that decision, the Commission expressly refused to accept the Charging Parties' fundamental premise: that Hudson requires a union demanding an agency fee to supply independent verification of the accuracy of its chargeable/nonchargeable cost allocations in order to provide fee payers with adequate notice and a meaningful opportunity to object. Nonetheless, while they do not contend that the underlying "legal" determination about the nature of chargeable costs can be audited effectively, the Charging Parties still maintain that fee payers do not receive a constitutionally adequate notice of the basis for the union's fee unless an auditor has guaranteed the trustworthiness of the cost allocations. The Charging Parties contend that Hudson requires a union to undertake an additional burden and expense, beyond the normal financial audit to which it may routinely subject its records, in order to supply an audit of the union's cost allocations.

In accordance with its decision in Malden, the Commission does not find probable cause to believe that the additional audit the Charging Parties propose is constitutionally required. For the purposes of a fee payer who must decide whether or not to object to the fee, the critical factor is the union's chargeability determinations, which implicate the fee payer's First Amendment rights, and which the Charging Parties concede cannot be effectively audited. However reliable the union's cost allocations may be, they will only be as accurate as are the union's "legal" determinations about the chargeable/nonchargeable nature of its expenditures. Should the fee payer challenge the fee, an impartial decisionmaker may revise the union's chargeability/nonchargeability determinations, and consequently alter the costs that the union initially allocated to each component. Since the cost allocations are thus contingent upon the union's chargeability determinations and subject to change if those determinations are unlawful, the Commission does not find that preliminary assurances on the cost allocations significantly contribute to the Charging Parties' ability to decide whether to object. Instead, as the district court stated in Hudson v. Chicago Teachers Union, Local

No. 1, 699 F.Supp. 1334, 1340 (N.D. Ill. 1988), the Charging Parties' argument "mistakenly equates the adequacy of the notice with the accuracy of the fee assessment." The Hudson district court further stated, "The Supreme Court in Hudson recognized that a [fee demand] could sufficiently serve its constitutional purpose -- providing information about the basis for the fee--without necessarily guaranteeing the accuracy of the fee." Id. Accordingly, the Commission does not find probable cause to conclude that the Constitution requires imposing this additional burden on the unions.

[6]In sum, consistent with Malden, the Commission concludes that, once the union has provided notice to fee payers about how it has calculated the fee, indicating to fee payers the basis for the union's assertions about its fee calculations and supplying audits of the underlying financial data, the union has satisfied Hudson's information requirement. Fee payers remain entitled to test, in subsequent hearings, both the legitimacy and the accuracy of the union's determinations about how much it spent on chargeable and nonchargeable activities.

Applying these principles to the evidence disclosed by the investigation, the Commission finds no probable cause to believe that the information provided by the NEA, the MTA, or the locals who furnished financial audits failed to fulfill the purpose of the information and audit requirements.[5] On the contrary,

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[5] The Charging Parties also argue that the SAS 29 audit provided by the NEA of its Supplemental Schedules provides an inadequate level of independent verification to the fee payer that the NEA's chargeable/nonchargeable allocations have not been misstated. In view of the Commission's probable cause determinations set forth in the text above, the Commission need not address this argument. The Commission notes, however, that the U.S. Court of Appeals for the Sixth Circuit has held, in Gwirtz, supra at 682, that an SAS 29 audit of a union's supplemental schedules satisfied Hudson's verification requirement. The court wrote:

> Hudson does not mandate a union to utilize the most detailed and effective service available to audit the financial information disclosed

those unions supplied evidence of the trustworthiness of their underlying fiscal data and an explanation of the basis of their fees that sufficiently enlightened fee payers about the basis of the fee demanded to enable the fee payers to decide whether to object. See, Antry v. Ill. Educational Labor Rel. Board, 195 Ill.App.3d 221, 241-42 (1990) ("Considered as a whole, the information which the fee payors received [which did not include an audit of the union's cost allocations] provided them with a complete picture of the expenditures of the NEA and the IEA for the time periods in [7]question, and of the nature of the activities for which the expenditures were made," and was therefore constitutionally adequate, citing Kuehn v. American Federation of State, County, & Municipal Employees, Council No. 65, 435 N.W.2d 130 (Minn. App. 1989)).

Accordingly, for all of the foregoing reasons, the Commission declines to issue a Complaint on those portions of the charges of prohibited practice that challenge the validity of the demands for payment of the NEA and MTA portions of the agency fee based upon the alleged insufficiency of the financial information provided at the time of demand, and they are dismissed. For these reasons, the Commission also dismisses the allegation in Chicopee Education Association, Massachusetts Society of Professors/FSU, New Bedford Education Association, Springfield Education Association, Arlington Education Association, Education Association of Worcester, and Woburn Education Association[6] that the demands for the respective local union's portion of the 1987-88 and/or 1988-89 school years were invalid because the

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> to nonmember employees...[T]he mere fact that a [SAS 62-type audit] would provide 'better' or more detailed financial information does not make provision of a [SAS 62-type audit] by the union constitutionally required. Hudson only requires that a union's procedures for collection of [agency] fees provide 'adequate' or 'sufficient' financial disclosure so that nonmember employees...may gauge the propriety of the union's fee (citation omitted).

[6] See attached Appendix of Cases for specific cases affected by this determination.

financial information that accompanied those demands did not include an audit of the local union's chargeable and nonchargeable cost allocations.[7]

In addition, in Arlington Education Association, ASF-2051 and 2233, the evidence was insufficient to establish probable cause to believe that the information provided with the demand for the local portion of the 1988-89 fee was inadequate because it did not include an audited financial statement of revenues and expenses by the local union for the preceding fiscal year. The investigation disclosed that the demand included copies of: (1) a "balance sheet" listing the amounts of various categories of general assets and liabilities on June 30, 1988; (2) a "summary of operations statement" listing the amounts of specific revenue sources and expenditures from July 1, 1987 to June 30, 1988; and (3) a "statement of budget to actual disbursements" for the period from July 1, 1987 to June 30, 1988, itemizing specific expenditures under the categories of office maintenance, administrative stipends, negotiations, workshops, and gifts and contributions. [8]Appended to these documents, as part of the demand information, was a letter from Robert Yeaton, a self-identified accountant, stating that he had examined the local union's records for the fiscal year "in accordance with generally accepted accounting methods and included such tests as deemed necessary under the circumstances," and representing that the statements "present fairly the financial position" of the local union for that year. The charging parties appear to contend that the financial statements were not "verified by an independent auditor" because Mr. Yeaton is not a certified public accountant but merely a unlicensed accountant or bookkeeper "who is a

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[7] However, the Commission has determined that there is probable cause to believe that the Respondents in Bridgewater Education Association, ASF- 2097, 2098; Fairhaven Education Association, ASF-2056, 2057; and Wareham Education Association, ASF-2055, 3015, violated G.L. c. 150E, Section 10 (b)(1) by not providing the Charging Parties in those cases with audited financial information concerning the local portion of the service fees. Complaints in those cases accompany this letter.

former director of the MTA's Division of Finance and Accounting." Charging Parties' Brief at 17. The affidavit of David Hawkins, submitted by the Charging Parties, characterizes Mr. Yeaton as "neither a certified public accountant nor a licensed public accountant." However, the Charging Parties adduced no direct evidence substantiating its assertions that would give the Commission probable cause to believe that Mr. Yeaton is not an independent accountant. Nor did the evidence establish any sufficient reason not to consider Mr. Yeaton's verification and opinion concerning the books and records of the local union as an "independent audit." Therefore this allegation also is dismissed.

In Education Association of Worcester, ASF- 2062 et seq.,[8] the Charging Parties also contend that the demand is invalid because it did not include an audited financial statement of the local union's revenues and expenses for the preceding fiscal year. The investigation disclosed that the local union's demand included copies of financial statements for the fiscal year ending June 30, 1988, audited by Walter Rozanski, a self-identified certified public accountant. Appended to the financial statements, as part of the demand information, was a letter from Mr. Rozanski stating that he had "reviewed" the financial statements, and representing that "[t]he examination was made in accordance with generally accepted accounting standards and ... included such tests of the accounting records and such other tests as were considered necessary in the circumstances." The letter also contained his opinion that financial statements "present fairly the financial position" of the local union for the year, "in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year." In their Brief, the Charging Parties do not directly contend that the demands failed to include an audited financial statement, but the Hawkins'

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[8] Case Nos. ASF-2062, 2079, 2063, 2080, 2064, 2081, 2065, 2082, 2096, 2066, 2083, 2067, 2084, 2068, 2085, 2069, 2070, 2087, 2118, 2071, 2088, 2072, 2089, 2073, 2090, 2074, 2091, 2075, 2092, 2076, 2093, 2077, 2094, 2078, and 2095.

affidavit, submitted by the Charging Parties, questions whether an "audit" or merely a "review" (which allegedly would be "less in scope" than an audit and should not contain a "positive opinion on [9]the union's assertions," Hawkins' affidavit at 12, n.1) was performed. The question is apparently raised merely because Mr. Rozanski's opinion letter uses the word "reviewed;" but the Hawkins affidavit concedes that "the form of report used is consistent with an audit engagement." These concerns are insufficient to establish probable cause to believe that the local union failed to include an audited financial statement as part of its demand. Accordingly, this allegation is dismissed.

Method of NEA Calculations

The Charging Parties also allege that the calculation of the fee contained in the information provided with the demand does not indicate that the NEA portion of the fee represents their proportional share of the NEA's permissible expenses, because the fee is calculated as a percentage of union dues, rather than the amount of the NEA's permissible expenses divided by the number of employees it represents. In Woburn Teachers Association, 13 MLC 1555, 1564 (1987), the Commission indicated that a union may demonstrate that the amount of a fee represents a nonmember's proportional share of its permissible expenses by either (1) dividing the total of the union's permissible expenses by the number of employees it represents, or (2) showing "that membership dues for a particular year represented the members' pro rata share of the anticipated union expenses for that year and that a particular proportion of those expenses were permissible." The second Woburn test contemplates that if the dues figure is itself a pro rata amount, a union could satisfy the proportionality requirement for a service fee that is calculated as the permissible percentage of union dues.

In the present cases, the investigation disclosed that the Unions' demands indicated that the NEA calculated the permissible percentage of its total expenses, and then applied that percentage to the total amount of union dues for "active" members to arrive at the service fee amount. The information

supplied with the demands included the NEA's Program Budget information, showing that dues and service fees funded over 99% of the NEA's total budgeted expenditures. The Charging Parties argue that (1) the Respondent was not permitted to calculate the fee as a percentage of dues under the second Woburn alternative, because its calculation was based upon actual, not "anticipated", expenses; and (2) since the NEA maintains other categories of members besides "active" (i.e., "retired," "staff," etc.), whom it charges a lower dues amount, the "active status" dues figure does not itself represent a pro rata share of the NEA's budgeted expenses.

The Commission does not find probable cause to believe that the demands are invalid for these reasons. First, the second Woburn test requires a union to show that its dues figure reflects each member's proportional contribution to the union's budgeted or "anticipated" expenses; it does not require that the permissible **[10]**percentage of total expenses be based upon anticipated rather than actual expenses. Second, where the union has shown that its budget is essentially derived from its anticipated dues collections, and that its fee is assessed as a percentage of the dues category to which the fee payers most analogously belong, the Commission considers that the union has adequately shown the basis for its assertion that its fee is proportional for purposes of a valid demand under Section 12 of the Law.[9] Accordingly, the allegation that the fee demands do not provide sufficient information about the proportionality of the NEA portion of the fee is dismissed.

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[9] The Charging Parties appear to argue in their reply brief that allowing the NEA to satisfy the proportionality requirement by use of the second Woburn formula will permit the NEA to assess Massachusetts fee payers for NEA expenditures in noncollective bargaining states. This argument appears to relate to the Charging Parties' position that the NEA's portion of the fee includes amounts it may not permissibly charge to the instant fee payers; while this issue does not affect the validity of the demands, it raises an issue that may be advanced at any eventual "amount" hearing in these cases.

Timeliness of Demands

The Commission also decided to dismiss the Charging Parties' allegation that the demands should be considered invalid because they were served upon them too late. The Charging Parties first argue that the Commission should deem invalid any demand given to a nonmember more than 45 days after the first day of the school year for which the fee is demanded. Although the Charging Parties point to no provision in Section 12 of G.L. c. 150E or the Commission's agency fee regulations, 456 CMR 17.00 et seq., that limits the time within which the union may demand payment of the service fee, they nonetheless argue that the Commission should create an obligation on the union to demand a fee within 45 days after the school year begins in order to promote the prompt adjudication of agency fee claims contemplated by the courts in Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1985), and Lyons v. Labor Relations Commission, 397 Mass. 498 (1986), and School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70 (1982). The Charging Parties argue in the alternative that, since Commission regulations (456 CMR 17.06(2)) require that a nonmember must file a charge challenging the fee within six months after the demand, the Commission ought to impose the same limitations period on the union to demand its fee within six months after the school year begins. The Charging Parties also note that imposition of a limitations period for fee demands would improve the Commission's ability to schedule consolidated hearings on fee payers' charges concerning the fee.

The Commission finds no probable cause to believe that Section [11]12 of the Law requires fee demands to be issued within 45 days, or six months, after the commencement of the school year for which the fee was demanded. The courts' decisions in the Hudson, Lyons and Greenfield cases contemplate that the union should provide a prompt opportunity for adjudication of a nonmember's challenge to the amount of the fee once it has been demanded. Even if this "prompt adjudication" requirement applies to the Commission's adjudicatory processes, nothing in those decisions suggests that a fee payer's constitutional interest in

prompt adjudication ripens before any demand has been made upon him or her, and thus before any obligation has arisen either to pay the fee or to challenge it. Assuming that the Commission considers it desirable for administrative efficiency to impose a limitations period on fee demands, it could impose such a requirement prospectively by regulation. In the absence of such a regulation setting forth a time limit for demands, the Commission finds no probable cause to invalidate the Unions' demands on the ground that they exceeded the time limits proposed by the Charging Parties. Therefore this allegation is dismissed.

Certain Charging Parties[10] also allege that the demands were invalid under Section 12 of the Law because they were made after the expiration of the collective bargaining agreement authorizing the service fee for that school year. The Charging Parties claim that, after the expiration of the collective bargaining agreement requiring payment of the fee for the particular school year, the Respondent had neither a contractual nor a statutory basis for collecting the fee.

Section 12 provides in pertinent part that an employer shall require payment of a service fee as a condition of employment

> during the life of a collective bargaining agreement so providing ... provided however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment has been formally executed, pursuant to a vote of a majority of employees in such bargaining unit present and voting.

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[10] The Charging Parties in the following cases advance this argument: New Bedford Educators Association, ASF- 2236, 2237, 2126, 2121, 2122, 2119, 2125, 2124, 2123, 2128, and 2129; Springfield Education Association, ASF-2243, 2241, 2242, 2061, 2108, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2143, 2144, 2145, 2146, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, and 2161; Wareham Education Association, ASF- 3015; Education Association of Worcester, ASF- 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, and 2078.

In each of the instant cases, during the 1987-88 school year for [12]which the fee has been demanded, there existed a collective bargaining agreement that satisfied the provisions of Section 12 and thus authorized the Respondent to require payment of service fees by nonmembers as a condition of employment. On the other hand, there is no dispute that the collective bargaining agreement covering the 1987-88 school year had already expired when the Respondent served upon each of the Charging Parties the demand for payment of a service fee for that school year. It is also undisputed that, at the time each of these demands were made, a properly ratified successor collective bargaining agreement was in effect and authorized a service fee. The terms of negotiated service fee provisions may vary, and, even with respect to apparently similar fee provisions, the parties' bargaining history and practice may reflect differing intent regarding the enforceability of the fee obligation after the contract's expiration. While such issues of contract interpretation and enforcement may arise between the union and the employer should a fee payer fail to pay the fee after he or she has exhausted all challenges, the validity of the union's demand does not require their resolution. So long as a fee payer offers no conclusive evidence that the expiration of the contract has extinguished the union's entitlement to collect that fee, a union may validly demand payment of a fee where it has established that a contract provision satisfying the requirements of Section 12 of the Law was in effect during the time period for which the fee is demanded. See Malden Education Association, 15 MLC 1037 (1989) (although issue not specifically raised, union's re-demands for service fees after expiration of the contract held valid). Therefore this allegation is also dismissed.

Disabled Employees

Finally, two of the Charging Parties, Richard Herbst (Herbst) and Hugh Galli (Galli), assert in Education Association of Worcester, Case Nos. ASF- 2067, 2070, 2084, and 2087 that the service fees demanded of them for the 1987-88 and 1988-89 school years were invalid because they were on disability leave and not working in the Worcester school system during those

years.[11] The gravamen of their argument is that they enjoyed no condition of employment that the Unions negotiated during the period of their disability. Therefore, they argue, it would violate the basic rationale underlying agency service fees -- to ensure that those who receive benefits from a union contribute to their fair share of the cost of those benefits -- if the Unions are permitted to demand that they pay a fee for the time that they were disabled.

[13] The Unions represented without contradiction, however, that both Herbst and Galli in fact enjoyed conditions of employment that it negotiated. Specifically, they continued to accrue seniority during the period of their disability, their salaries or the worth of their sick leave benefits were determined pursuant to the negotiated collective bargaining agreements, they both received health insurance benefits under those agreements, and they had the benefit of the contractual grievance-arbitration procedure to ensure the enforcement of those benefits. Accordingly, the Unions assert, the agency fees it demanded of Herbst and Galli were consistent with the rationale underlying service fees and should not be considered invalid.

The Commission finds no probable cause to believe that the Unions' demands that Herbst and Galli pay service fees for the 1987-88 and 1988-89 school years were invalid because those two employees were disabled during that period. The investigation established that both employees enjoyed benefits negotiated by the Unions. Further, there is no evidence that union members would have been relieved of the obligation to pay dues during similar periods of disability. Therefore, the Commission dismisses that portion of Herbst's and Galli's charges alleging that the fees demanded of them during the period of their disabilities were invalid.

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[11] Since the demand for the NEA portion of the fee was later withdrawn, the demands upon Herbst and Galli are for the MTA's and the local union's portions of the service fees for the 1987-88 and 1988-89 school years.

Very truly yours,
LABOR RELATIONS COMMISSION

/s/
Ann Moriarty
Executive Secretary

AM/kf

The charging party may, within seven (7) days of receipt of this notice, seek a review of this determination by the Commission, pursuant to MLRC Rules 456 CMR 15.04(3). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall serve a copy of the request on the opposing party or its counsel, if any.

[1]APPENDIX OF CASES

CHARGING PARTY	EDUCATION ASSOCIATION	CASE #
GALLUCCIO, RONALD	ARLINGTON	ASF-2233
STORLAZZI, EDMUND	ARLINGTON	ASF-2051
DUPUIS, DAVID	BRIDGEWATER	ASF-2097
DUPUIS, ELEANOR	BRIDGEWATER	ASF-2098
CLARK, WILLIAM L	CHICOPEE	ASF-2235
CRANE, RUBY	CHICOPEE	ASF-2225
CRANE, HARRY	CHICOPEE	ASF-2224
MACHOWSKI, KASMIR S	CHICOPEE	ASF-2226
ANTHONY, PETER P	FAIRHAVEN	ASF-2057
CIPOLLINI, CHARLES	FAIRHAVEN	ASF-2056
ANSELME, JEAN-PIERR	FSU	ASF-2216
BLACKWELL, JAMES E	FSU	ASF-2217
BRANCH, BEN	FSU	ASF-2202
CHAPPELL, VERA	FSU	ASF-2203
DAVIS, ROBERT	FSU	ASF-2204
DYM, CLIVE L	FSU	ASF-2205
EBERSOLE, JOHN P	FSU	ASF-2218
FOSS, CLIVE	FSU	ASF-2219

GARRETT, GERALD R	FSU	ASF-2220
HARRISON, EDWARD R	FSU	ASF-2206
JACOBSON, BRUCE S	FSU	ASF-2207
KREISLER, MICHAEL	FSU	ASF-2208
LACEY, NELSON J	FSU	ASF-2209
[2]MAHON, HAROLD P	FSU	ASF-2221
MALONE, MICHAEL F	FSU	ASF-2210
MESTRE, JOSE	FSU	ASF-2211
MOVAHEDI, SIAMAK	FSU	ASF-2222
NASH, WILLIAM A	FSU	ASF-2212
PALMER, JOHN D	FSU	ASF-2213
ROTTENBERG, SIMON	FSU	ASF-2214
SCHWARTZ, LOWELL M	FSU	ASF-2223
SEIFORD, LARRY	FSU	ASF-2215
DONAHUE, THOMAS J	HOLYOKE	ASF-2054
ARMSTRONG, CLYDE	NEW BEDFORD	ASF-2122
ARMSTRONG, CLYDE	NEW BEDFORD	ASF-2134
BURCHELL, MARGUERITE	NEW BEDFORD	ASF-2123
BURCHELL, MARGUERITE	NEW BEDFORD	ASF-2135
CARREIRO, RICHARD	NEW BEDFORD	ASF-2124

CARREIRO, RICHARD	NEW BEDFORD	ASF-2136
FINNERTY, LAWRENCE	NEW BEDFORD	ASF-2236
FLYNN, DEBORAH	NEW BEDFORD	ASF-2125
FLYNN, DEBORAH	NEW BEDFORD	ASF-2137
HARPER, MARIAL M	NEW BEDFORD	ASF-2128
HARPER, MARIAL M	NEW BEDFORD	ASF-2140
HEBERT, SYLVIA	NEW BEDFORD	ASF-2126
HEBERT, SYLVIA	NEW BEDFORD	ASF-2138
KENNEDY, KATHLEEN	NEW BEDFORD	ASF-2119
KENNEDY, KATHLEEN	NEW BEDFORD	ASF-2131
MARKEY, NORMA	NEW BEDFORD	ASF-2237
[3]PALLATRONI, JEANNE	NEW BEDFORD	ASF-2121
PALLATRONI, JEANNE	NEW BEDFORD	ASF-2133
SHEPHERD, ELLEN	NEW BEDFORD	ASF-2129
SHEPHERD, ELLEN	NEW BEDFORD	ASF-2141
WHITMAN, HELEN	NEW BEDFORD	ASF-2238
ADAMS, HELENE	SPRINGFIELD	ASF-2102
ADAMS, HELENE	SPRINGFIELD	ASF-2111
BARNETT, SHARON	SPRINGFIELD	ASF-2112
BARNETT, SHARON	SPRINGFIELD	ASF-2103

BEAUREGARD, ELIZABETH	SPRINGFIELD	ASF-2104
BEAUREGARD, RAYMOND J	SPRINGFIELD	ASF-2105
BELHUMEUR, JAMES	SPRINGFIELD	ASF-2162
BURGER, MARY	SPRINGFIELD	ASF-2144
BURGER, MARY	SPRINGFIELD	ASF-2163
BURNS, MICHAEL	SPRINGFIELD	ASF-2145
BURNS, MICHAEL	SPRINGFIELD	ASF-2164
BURNS, PATRICIA	SPRINGFIELD	ASF-2146
BURNS, PATRICIA	SPRINGFIELD	ASF-2165
CANAVOSIO, CAROLYN	SPRINGFIELD	ASF-2113
CANAVOSIO, CAROLYN	SPRINGFIELD	ASF-2106
CARLSON, NANCY S	SPRINGFIELD	ASF-2148
CARLSON, NANCY S	SPRINGFIELD	ASF-2167
COOK JR. KENNETH E	SPRINGFIELD	ASF-2239
COOK JR. KENNETH E	SPRINGFIELD	ASF-2243
DANTON, SUSAN J	SPRINGFIELD	ASF-2183
DOWNEY, BRIAN J	SPRINGFIELD	ASF-2060
[4]DOWNEY, BRIAN J	SPRINGFIELD	ASF-2061
ETHIER, RAYNA D	SPRINGFIELD	ASF-2244
FENTON, DENNIS A	SPRINGFIELD	ASF-2114

FENTON, DENNIS A	SPRINGFIELD	ASF-2107
FINKEL, BARBARA W	SPRINGFIELD	ASF-2149
FINKEL, BARBARA W	SPRINGFIELD	ASF-2168
FLINT, JEAN Z	SPRINGFIELD	ASF-2108
FLINT, JEAN Z	SPRINGFIELD	ASF-2115
FREEMAN, BARBARA A	SPRINGFIELD	ASF-2150
FREEMAN, BARBARA A	SPRINGFIELD	ASF-2169
GILBERT, DEBORAH	SPRINGFIELD	ASF-2151
GILBERT, DEBORAH	SPRINGFIELD	ASF-2170
GOODERMOTE, WALDO	SPRINGFIELD	ASF-2152
GOODERMOTE, WALDO	SPRINGFIELD	ASF-2171
GROSS, ESTELLE A	SPRINGFIELD	ASF-2153
GROSS, ESTELLE A	SPRINGFIELD	ASF-2172
KARR, ELIZABETH	SPRINGFIELD	ASF-2184
KENNEDY, ANGELA	SPRINGFIELD	ASF-2154
KENNEDY, ANGELA	SPRINGFIELD	ASF-2172
KEOGH, HARRIET S	SPRINGFIELD	ASF-2240
KEOGH, HARRIET S	SPRINGFIELD	ASF-2245
LE CLAIR, STEPHEN	SPRINGFIELD	ASF-2116
LE CLAIR, STEPHEN	SPRINGFIELD	ASF-2109

LE MAY, PATRICIA	SPRINGFIELD	ASF-2241
LE MAY, PATRICIA	SPRINGFIELD	ASF-2246
LUNDRIGAN, EDWARD	SPRINGFIELD	ASF-2155
[5]LUNDRIGAN, EDWARD	SPRINGFIELD	ASF-2174
MACPHAUL, LAURA	SPRINGFIELD	ASF-2156
MACPHAUL, LAURA	SPRINGFIELD	ASF-2175
MANOLAKIS, ELLEN	SPRINGFIELD	ASF-2242
MANOLAKIS, ELLEN	SPRINGFIELD	ASF-2242
MANOOGIAN, MARTIN	SPRINGFIELD	ASF-2185
MAZZAFERRO, MARIA	SPRINGFIELD	ASF-2157
MAZZAFERRO, MARIA	SPRINGFIELD	ASF-2176
O BRIEN, GERALD	SPRINGFIELD	ASF-2158
O BRIEN, GERALD	SPRINGFIELD	ASF-2177
ROBERTS, NANCY	SPRINGFIELD	ASF-2117
ROBERTS, NANCY	SPRINGFIELD	ASF-2110
SANDERSON, WILLIAM E	SPRINGFIELD	ASF-2159
SANDERSON, WILLIAM E	SPRINGFIELD	ASF-2178
YARMESKY, MARGARET	SPRINGFIELD	ASF-2161
YARMESKY, MARGARET	SPRINGFIELD	ASF-2180
WOOD BETSY ANN	WAREHAM	ASF-2055

CROSS, GENEVIEVE	WOBURN	ASF-2229
GALLUCCIO, DIANE	WOBURN	ASF-2230
GARVEY, ANNE	WOBURN	ASF-2231
LUCHINI, ANN	WOBURN	ASF-2232
BADGIO, JAMES D	WORCESTER	ASF-2062
BADGIO, JAMES D	WORCESTER	ASF-2079
CONNOLLY, JAMES	WORCESTER	ASF-2063
CONNOLLY, JAMES H	WORCESTER	ASF-2080
DAVIS, ROBERT	WORCESTER	ASF-2064
[6]DAVIS, ROBERT	WORCESTER	ASF-2081
DOUGAL, BRIAN	WORCESTER	ASF-2065
DOUGAL, BRIAN	WORCESTER	ASF-2082
DOWD, JOHN F	WORCESTER	ASF-2096
ELWORTHY, DAVID E	WORCESTER	ASF-2066
ELWORTHY, DAVID E	WORCESTER	ASF-2083
GALLI, HUGO	WORCESTER	ASF-2067
GALLI, HUGO	WORCESTER	ASF-2084
GUILIANO, FRANCIS	WORCESTER	ASF-2068
GUILIANO, FRANCIS	WORCESTER	ASF-2085

GUSTAFSON, JOSEPH	WORCESTER	ASF-2069
HERBST, RICHARD	WORCESTER	ASF-2070
HERBST, RICHARD	WORCESTER	ASF-2087
MANDELL, JOHN	WORCESTER	ASF-2118
MARZILLI, JOHN F	WORCESTER	ASF-2071
MARZILLI, JOHN F	WORCESTER	ASF-2088
MCGRAIN, CAROL	WORCESTER	ASF-2072
MCGRAIN, CAROL	WORCESTER	ASF-2089
MCGRAIN, THOMAS	WORCESTER	ASF-2073
MCGRAIN, THOMAS	WORCESTER	ASF-2090
MORELLE, LORETTA	WORCESTER	ASF-2074
MORELLE, LORETTA	WORCESTER	ASF-2091
PAPANDREA, ARTHUR J	WORCESTER	ASF-2075
PAPANDREA, ARTHUR J	WORCESTER	ASF-2092
POCARO, FRANCIS	WORCESTER	ASF-2076
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[7]RICCIARDI, RICHARD	WORCESTER	ASF-2077
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APPENDIX C

OPINION OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

August 8, 1990

[1] [Letterhead omitted in printing]

August 8, 1990

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RE: Springfield Education Association/MTA/NEA, et al.
ASF-2143, et al.

Gentlemen:

Please be advised that upon reconsideration, the Commission, Commissioners Edgar and Walsh participating, decided to affirm its decision to dismiss certain portions of the charges of prohibited practice in the above-captioned cases that challenge the validity of demands for payment of an agency fee based upon the alleged inadequacy of the information provided to the Charging Parties with the demands for the fee, the alleged

untimeliness of the demands, and other validity issues pertaining only to certain cases. In addition to the reasons set forth in the Commission's letter of dismissal dated June 1, 1990, the Commission affirms the dismissal for the reasons discussed below.

[2]The Charging Parties contend in their request for reconsideration that by the language of the June 1 letter of dismissal, the Commission misunderstood one of the Charging Parties' arguments. In its dismissal letter, the Commission characterized the Charging Parties' "fundamental premise" as follows: "[Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1985)] requires a union demanding an agency fee to supply independent verification of the accuracy of its chargeable/non-chargeable cost allocations in order to provide fee payers with adequate notice and a meaningful opportunity to object. Nonetheless, while they do not contend that the underlying 'legal' determination about the nature of chargeable costs can be audited effectively, the Charging Parties still maintain that fee payers do not receive a constitutionally adequate notice of the basis for the union's fee unless an auditor has guaranteed the trustworthiness of the cost allocations". The Charging Parties object to the Commission's characterization of their position as a concession that the Union's underlying "legal" determination of what costs are chargeable and nonchargeable cannot be audited effectively by an independent public accountant. Rather, the Charging Parties reassert their contention that "auditors can, consistent with the Generally Accepted Auditing Standards, perform specific audits of the union's chargeability vs. nonchargeability calculations".

By this contention the Commission understands the Charging Parties to mean that an independent financial audit should verify that a union has spent its funds for the purposes claimed in the union's description of its expenditures. Thus, if a union claims to have spent $500 on refreshments for bargaining committee members, an auditor should audit whether $500 was spent, and whether it was spent to refresh bargaining committee members. The charging parties argue further that when the union claims that the $500 expense is permissibly charged to bargaining unit

members, an independent financial audit can, and should, verify that the union has consistently and appropriately applied some guidelines to determine the permissibility of the expense. The Charging Parties correctly argue that an auditor could apply the union's own internal guidelines to verify that they have been followed consistently and accurately. Thus, a union might establish "chargeability" guidelines that specify that all expenditures incurred by bargaining committee members are permissibly charged to fee payers. An auditor could verify that the refreshment expense was such an expenditure. Whether the union's internal guidelines were legally correct, however, (i.e., whether all expenses incurred by bargaining committee members are legally permissible expenditures within the meaning of the Commission's Regulations or the Law) is a very separate question. The Commission does not understand the Charging Parties to argue that the financial accountant can, in the normal course of a financial audit, offer a legal opinion concerning the permissibility of the expense. In the Commission's dismissal letter of June 1, 1990, it was this concession to which the Commission made reference.

[3]The Commission reaffirms its prior decision that neither footnote 18 of the United States Supreme Court's decision in Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 307 n.18 (1985), nor the Commission's case decisions or regulations require a union to supply to a fee payer a financial audit designed to disclose whether the union's "chargeability" guidelines are legally consistent with G.L. c.150E, Section 12, the Commission's Regulations, or applicable case law. While some fee payers might be reassured to know that an independent financial accountant had determined that the union's decision to allocate all refreshments for bargaining committee members to the "permissible" expense category was consistent with the Commission's regulations and case law, the Commission does not consider such an opinion necessary to the fee payer's decision about whether to challenge the fee demanded. If the fee payer questions how the union decided to allocate certain expenses, the fee payer can file an application for a rebate of, or reduction in, the fee, and can file a charge challenging the fee with the Commission. A union

may choose to secure a more rigorous or detailed level of financial audit than that required by the Commission because it may answer more questions for potential fee payers and thereby preclude additional challenges. For the purposes of this request for reconsideration, however, it suffices to note that the Commission does not find probable cause to believe that the higher level (the so-called SAS 62 level) audit is statutorily or regulatorily required.

Accordingly, the prior dismissal of the charge is affirmed.

Very truly yours,
LABOR RELATIONS COMMISSION

/s/
ANN MORIARTY
EXECUTIVE SECRETARY

AM/sdms

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of G.L. c.150E, s.11. Any party aggrieved by a final order of the Commission may institute proceedings for judicial review in the Appeals Court pursuant to G.L. c.150E, s.11. To claim such an appeal, the appealing party must file a Notice of Appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

No. 91-1265

APR 9 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES BELHUMEUR, *et al.*,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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BRIEF IN OPPOSITION FOR RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION

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QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts erred when it concluded that the financial information sent to nonmember employees prior to the collection of agency fees—which included lists of the major categories of respondent unions' expenses that were verified by an independent auditor and that identified which of those expenses respondent unions considered legally chargeable and legally nonchargeable to objecting nonmember employees—satisfies the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor." *

* Petitioners precede their statement of the Question Presented with a reference to *Hudson*, in which they assert that "*Hudson* requires unions to provide nonmembers with a 'certified public accountant's verified breakdown of expenditures.'" Petition for a Writ of Certiorari at i (citing 475 U.S. at 310). We note in passing that this statement in *Hudson* was not directed toward the adequacy of the financial information that is sent to nonmember employees prior to the collection of agency fees, which is the issue presented by the Petition. To the contrary, the Court at that point in *Hudson* was discussing the requirement of "an escrow for the amounts reasonably in dispute while . . . challenges are pending," *id.* at 310, and in that context the Court indicated what the escrow obligation would be "[*i*]*f, for example*, the original disclosure by the union had included a certified public accountant's verified breakdown of expenditures," *id.* (emphasis added).

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IN THE

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OCTOBER TERM, 1991

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Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

---

BRIEF IN OPPOSITION FOR RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION AND NATIONAL EDUCATION ASSOCIATION

Respondents Massachusetts Teachers Association and National Education Association file this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are teachers in various public school districts in Massachusetts or faculty members at the University of Massachusetts, which is a public-sector institution. In all of these school districts and at the University of Massachusetts, a local education association ("local association") that is affiliated with the Massachusetts Teachers Association ("MTA") at the state level and the National Education Association ("NEA") at

the national level is recognized as the exclusive bargaining representative for the bargaining units comprised of the teachers or faculty members. (The local associations, MTA and NEA are sometimes hereinafter collectively referred to as the "Associations.") Although petitioners are members of these bargaining units, they chose not to join their respective local associations during the 1987-88 or 1988-89 school years. *See* Appendix to Petition ("App. P.") at 12a.

In their capacity as exclusive representatives, the local associations entered into collective bargaining agreements with their respective school districts and the University of Massachusetts for the 1987-88 and 1988-89 school years. As permitted by Massachusetts law—specifically, Mass. Gen. L. ch. 150E, § 12—each of these collective bargaining agreements contained a provision requiring employees in the bargaining unit who were not members of the exclusive representative to pay an agency fee for services rendered by the exclusive representative and its affiliated organizations. Pursuant to these provisions, the local associations charged petitioners an agency fee for the 1987-88 and 1988-89 school years. App. P at 2a.

To collect those agency fees, the local associations followed a procedure that was adopted by MTA to govern fee collections from all nonmember employees in Massachusetts who were subject to an agency fee provision involving one of MTA's affiliated local associations. As the first step in that procedure, each nonmember employee was provided with an informational package explaining how the relevant local association, MTA, and NEA each calculated its portion of the agency fee. After receiving the informational package, each nonmember employee had a period of thirty days within which to file a written objection to the amount of the agency fee. If a nonmember employee objected, the entire amount of his or her agency fee was placed in an escrow account until

an impartial decisionmaker issued a decision on the exact proportion of the fee that was lawfully chargeable to objecting nonmember employees. Appendix in the Supreme Judicial Court of Massachusetts ("App. MSJC") at 449.

Because the Question Presented by the Petition concerns the adequacy of the financial data that was provided to nonmember employees, we describe below the relevant documents that were included in the informational package.[1]

1. *Local Associations* [2]

The local association portion of the informational package included two documents. One document was a copy of the local association's basic financial statements for the 1987-88 fiscal year. These statements, which showed the major categories of the local association's expenses, were verified by an independent auditor.[3]

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[1] The Associations based their agency fees for both the 1987-88 and 1988-89 school years on financial data for the 1987-88 school year. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986) ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceeding year"). Accordingly, only the adequacy of the financial disclosure for 1987-88 is at issue.

[2] Although there is some variation in the financial data that was provided by the local associations, *see* App. MSJC at 754-996, these variations are not relevant to the Question Presented by the Petition. The description in text therefore is generalized to reflect the financial data that was provided by most of the local associations.

[3] This is true of all of the local associations whose portion of the agency fee is at issue in the Petition. Three additional local associations that initially were included in these proceedings did not provide audited financial statements of their major categories of expenses, and the Massachusetts Labor Relations Commission issued complaints against these three local associations. App. P. 19a n.7. The financial disclosure provided for the local association portion of the agency fee for these three local associations was not

The other document provided to nonmember employees was entitled "Fee Explanation," and demonstrated how the local association calculated its share of the agency fee. The Fee Explanation broke the local association's expenses into eighteen separate categories (such as Contract Negotiations, Grievances/Arbitrations, Publications, Social Activities, Conventions/Workshops/Meetings, etc.), described each category, and indicated whether and to what extent the category was chargeable or nonchargeable to objecting nonmember employees. The process followed to compute the reduced agency fee was explained in narrative form on the first page of the Fee Explanation. The Fee Explanation, which typically was prepared by the local association treasurer, was not subjected to an independent audit. *See* App. MSJC at 202-12.

2. *MTA*

The informational package also included a copy of MTA's basic financial statements for the 1987-88 fiscal year. These statements, which showed the major categories of MTA's expenses, had been subjected to an independent audit by the certified public accounting firm of Arthur Young.

In order to provide a more detailed picture of MTA's expenses, the auditor prepared a Schedule of Total Costs by Department, and this document also was included in the informational package. The Schedule of Total Costs by Department broke expenses into MTA's six service divisions: Affiliate Services, Legal Services, Governmental Services, Communications, Professional Development, and Research. It then broke these expenses down even further into programs within each division, and described each program. Each program in turn was

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included in the appeal to the Massachusetts Supreme Judicial Court, is not included in the Petition, and is not included in the references in this Brief in Opposition to the local association portion of the informational package.

broken into sub-programs and each sub-program was again described. All in all, MTA's activities were broken down into just under one hundred expenses, each one described, and this breakdown was audited by Arthur Young. MTA then allocated each of the latter expenses as chargeable or nonchargeable to objecting nonmember employees. The auditor supplied an explanation of the basis for MTA's allocation, reciting that MTA had relied upon "the rules and regulations of the Massachusetts Labor Relations Commission for determining permissible or chargeable costs, and impermissible or nonchargeable costs," but that the chargeable/nonchargeable allocation itself was unaudited.

Nonmember employees were in addition provided with a narrative statement explaining how MTA calculated its share of the agency fee. App. MSJC at 231-83.

3. *NEA*

With regard to NEA's portion of the agency fee, nonmember employees were provided with a copy of NEA's basic financial statements for the 1987-88 fiscal year. These statements, which listed NEA's major categories of expenses, had been subjected to an independent audit by the certified public accounting firm of Coopers & Lybrand.

Also included for NEA was a Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures. This Supplemental Schedule, which had been audited by Coopers & Lybrand, provided each nonmember employee with a breakdown of NEA's chargeable expenses by program and administrative area, and the accompanying auditors' notes described each program and area and set forth the criteria that NEA had used to allocate its expenses as chargeable and nonchargeable. The auditors confirmed that NEA had in fact expended the amounts claimed as chargeable and nonchargeable, but did not certify the accuracy of the allocation itself.

Finally, nonmember employees received a document entitled "How NEA Calculates Its Agency Fee Chargeable/Nonchargeable Expenditures." This document set forth in narrative form the criteria that NEA used to determine chargeable and nonchargeable expenses, and the procedure that it used to calculate its share of the agency fee. App. MSJC at 341-92.

For purposes of the Question Presented in the Petition, two points concerning the financial data that was provided to nonmember employees in connection with the demand by the Associations for the payment of agency fees are of particular relevance:

1. Each local association, MTA, and NEA provided nonmember employees with a copy of their basic financial statements for the 1987-88 fiscal year. These statements, which listed the major categories of each association's expenses, were verified by an independent auditor.

2. Each local association, MTA, and NEA provided nonmember employees with a detailed breakdown of their expenses into chargeable and nonchargeable categories, and explained the basis for the allocation. The accuracy of the chargeable/nonchargeable allocation was not verified by an independent auditor for the local associations, MTA, or NEA,[4] in the sense that the auditors did not themselves separate chargeable from nonchargeable expenses "[p]ursuant to proper guidelines founded on established legal considerations." Decision of the Supreme Judicial Court of Massachusetts, App. P. at 5a.

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[4] As noted, NEA's Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures was independently audited, thus verifying that the funds in fact were expended for the purposes indicated.

B. The Decisions Below

1. *The Massachusetts Labor Relations Commission*

These proceedings began when petitioners filed prohibited practice charges with the Massachusetts Labor Relations Commission ("Commission") against the local associations that were recognized as their exclusive representatives. The charges, which were substantially identical, challenged the validity of the demands made by the local associations for payment of agency fees for the 1987-88 and 1988-89 school years on the ground, *inter alia*, of the alleged inadequacy of the financial data provided with the demands. Citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), which stated that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor," petitioners argued that, when demanding payment of an agency fee, the accuracy of the allocation of union expenses as chargeable or nonchargeable must be verified by an independent auditor. They contended that the demands in this case were invalid because the Associations had failed to comply with this alleged constitutional prerequisite. App. P. at 12a-13a.

The Commission disagreed. Noting that the local associations, MTA, and NEA all had provided nonmember employees with, *inter alia*, audits of their basic financial statements, which listed the major categories of the Associations' expenses, the Commission held that nonmember employees had received adequate information to enable them to decide whether to object to the agency fee, and that this "satisfied *Hudson*'s information requirement." App. P. 17a. In this regard, the Commission emphasized that:

> Fee payers remain entitled to test, in subsequent hearings, both the legitimacy and the accuracy of the union's determinations about how much it spent on chargeable and nonchargeable activities. [*Id.*]

2. *The Supreme Judicial Court of Massachusetts*

On appeal to the Supreme Judicial Court of Massachusetts, petitioners again argued that their "First Amendment rights have been violated because no independent auditor has certified to the correctness of the allocation of chargeable and nonchargeable expenses, on the basis of which each union determined the agency service fee it charged." App. P. at 2a. The Supreme Judicial Court rejected this argument, and affirmed the Commission's "determination to dismiss the plaintiffs' charges and not to issue complaints on them insofar as those charges are based on the absence of an independently audited verification of a union's separation of chargeable from nonchargeable expenses." *Id.* at 3a. The court noted that "[t]hat position has been rejected in every Federal Circuit Court of Appeals that has passed on it." *Id.*

Although the court below observed that, "[p]ursuant to proper guidelines founded on established legal considerations, an auditor could probably do a satisfactory job of properly separating chargeable from non-chargeable expenses," *id.* at 5a, the "crucial question," the court said, "is not . . . whether an independent audit would be a good idea,[5] but rather whether the First Amendment rights of agency service fee payers can be protected only if a report of such independent audit accompanies a union's demand for payment of an agency service fee," *id.* The Supreme Judicial Court answered this question in the negative.[6] Like the Commission, the court relied for

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[5] Petitioners misstate the position of the Supreme Judicial Court when they assert, on the basis of this "open question," that the court recognized that "an audit of the unions' chargeable vs. nonchargeable cost allocations . . . would likely be a 'good idea.'" Petition at 12.

[6] Although, as petitioners note, the court below concluded that "the language [in footnote 18] of the *Hudson* opinion is incon-

this answer on the distinction between the threshold requirement in *Hudson* that nonmember employees be provided with an explanation of the basis for the agency fee sufficient to enable them to determine whether or not to object, and the subsequent *Hudson* requirement that an objecting nonmember employee have the opportunity to challenge the amount of the fee before an impartial decisionmaker. As the court put it:

> The information that the union must provide under the *Hudson* opinion [at the explanation stage] is not intended to be dispositive of any dispute. That information is designed only to permit an agency fee payer to decide whether to oblige the union to prove before an independent fact finder that the agency fee charged was properly determined. Information from an audit of chargeable and nonchargeable expenses might be helpful in making that decision, but it would not be conclusive, and in our judgment is not necessary to provide the First Amendment protections considered in the *Hudson case.* [App. P. at 7a.]

REASONS FOR DENYING THE WRIT

In *Hudson*, this Court set forth certain requirements that a procedure for the collection of agency fees must meet in order to pass constitutional muster, including "an

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clusive," App. P. at 6a, it did offer the following observation as to the relevant language:

> Footnote 18 says in part that 'adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.' The requirement stated in that footnote of 'verification by an independent auditor' does not tell us clearly what is to be verified. It seems to be merely verification of 'the major categories' of expenses, and, if so, that requirement does not aid the plaintiffs' argument for an independent audit separating chargeable and nonchargeable expenses within categories of expenses. [*Id.* at 6a n.4.]

adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310. In this case, petitioners raise a question about the application of the first of these requirements to the Associations' procedure, but this question does not warrant consideration by this Court.

The threshold obligation that *Hudson* imposes upon a union that seeks to collect agency fees is to provide all nonmember employees with *"an adequate explanation* of the basis for the fee." *Id.* (emphasis added). *See id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court in *Hudson* also specified the information that a union must distribute to nonmember employees in order to meet this requirement. The Court initially stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an "undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239-40 n.40 (1977)). Finally, and of particular relevance here, the Court indicated in a footnote that "adequate disclosure

surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

Petitioners contend that this latter reference in footnote 18 of *Hudson* to "verification by an independent auditor" means that an auditor must determine at the explanation stage of the collection procedure whether a union accurately has categorized its expenses as legally chargeable and legally nonchargeable, and that the Supreme Judicial Court of Massachusetts ignored this alleged constitutional requirement when it "refused to require an audit of the union's chargeable vs. nonchargeable cost allocations." Petition at 12. There is no merit to this position, and the ruling by the court below is plainly correct.

The primary purpose behind *Hudson*'s explanation requirement is to ensure that a nonmember employee has sufficient information to decide whether or not to object to the amount of the agency fee. In order to make this decision, the Court in *Hudson* indicated that a nonmember employee should be provided with two types of information. First, a nonmember employee needs financial data that sets forth the actual amount of expenditures in each of the union's "major categories of expenses," which information the Court stated should be verified by an independent auditor to ensure its accuracy. 475 U.S. at 307 n.18. In addition, the nonmember needs to know which major categories of expenses, and what amounts within these categories, the union believes to be lawfully chargeable to objecting nonmember employees—*i.e.*, the union should "identif[y] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members —and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. With this information in hand, the nonmember employee will be able to

make an informed decision on whether to object to the amount of the agency fee being charged by the union.[7]

Thus, notwithstanding petitioners' argument to the contrary, there is nothing in footnote 18 of the *Hudson* decision to suggest that an independent auditor is required to verify the accuracy of a union's breakdown between legally chargeable and legally nonchargeable expenses. Indeed, such an interpretation of footnote 18 would be at odds with the subsequent requirement in *Hudson* that the accuracy of the agency fee be determined by an "impartial decisionmaker."

As noted, *Hudson* requires *both* "an adequate explanation of the basis for the fee" *and* "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." The purpose of the explanation is not, as petitioners maintain, "to insure that the union's reduced fee calculations are reasonably accurate," Petition at 17, or to provide "pre-collection assurance that the amount of money about to be seized from agency fee payers has been accurately calculated and verified," *id.* at 13 n.11. Its purpose is rather to provide the nonmember employee with sufficient information to decide whether or not to file an objection. *Hudson*, 475 U.S. at 306; *Gwirtz v. Ohio Education Ass'n*, 887 F.2d 678, 682 (6th Cir. 1989), *cert. denied*, 494 U.S. 1080 (1990); *Dashiell v. Montgomery County*, 925 F.2d 750, 758 (4th Cir. 1991); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987); *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989). As the Seventh

[7] To be sure, the obligation imposed on a nonmember who decides to file an objection to the amount of the fee should not be burdensome. That is why, after receiving the required information, the nonmember who wants to object to the fee is merely required "to make his objection known." 475 U.S. at 306 n.16. And the information needed to make such a general objection is obviously much less than would be the case if the objector were required to specify the basis for his or her objection or to identify particular expenses to which he or she objected.

Circuit recently explained, it is an "impartial decisionmaker," and *not* an auditor, who determines whether the amount claimed by the union is, in fact, accurate:

> The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; *the impartial decisionmaker determines the correctness of the fee amount;* and the escrow protects the challengers' funds pending such a decision.

Hudson v. Chicago Teachers Union, 922 F.2d 1306, 1314 (7th Cir.) (emphasis added), *cert. denied*, 111 S. Ct. 2852 (1991). As in the latter case, petitioners' challenge in this case

> mistakenly equates the adequacy of the notice with the accuracy of the fee assessment, *Hudson*, 699 F. Supp. at 1340, and thus squarely contradicts *Hudson*'s holding and rationale.

Id. Accepting petitioners' argument "would in effect render redundant and irrelevant the requirement that an impartial decisionmaker hear the dispute." *Id.*

The Fourth Circuit in *Dashiell* likewise relied on this important distinction in holding that an auditor need not "review the Union's initial allocation decision," 925 F.2d at 756, or "review or verify whether a particular article [is] chargeable," *id.* at 758. The court emphasized that such a function is to be performed by an impartial decisionmaker at a hearing at which the union must carry the burden of proving chargeability:

> Considering that the information need not be exhaustive, or even so encompassing as to allow the employees to determine finally whether the union is correct in the allocation, the information supplied by the Union here was adequate to enable the nonunion employees to make a decision whether to object. If they object, the Union will then have the

> burden to demonstrate before an independent decisionmaker that its position is justified.

Id. See also Andrews v. Education Ass'n of Cheshire, 829 F.2d 35, 340 (2d Cir. 1987) ("The [nonmembers'] interpretation of *Hudson*'s auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987) ("the categorization of any potential expense" as chargeable or nonchargeable is properly "an administrative determination by the independent decisionmaker").[8]

In sum, petitioners' argument that the auditor must verify the union's chargeable/nonchargeable allocation in order to "provide some pre-collection assurance that the amount . . . has been accurately calculated," Petition at 13 n.11, fails because it " 'mistakenly equates the adequacy of the notice with the accuracy of the fee assessment.' " *Hudson v. Chicago Teachers Union*, 922 F.2d at 1314 (citation omitted).

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[8] The agency fee procedure adopted by MTA for determining the amount of the agency fee provides for a hearing before an independent arbitrator selected in accordance with the American Arbitration Association Rules for Impartial Determination of Union Fees ("AAA Rules"). App. MSJC 449-55. The procedure requires the Associations to carry the burden of proving the amount of the fee and to make available to the objecting nonmember employee certain records that they have relied on to justify the fee. No fees may be released from escrow and paid to the Associations until the arbitrator makes his/her final award. The use of an arbitrator selected in accordance with the AAA Rules has been upheld by every court that has addressed the issue. *See, e.g., Ping v. National Education Ass'n*, 870 F.2d 1369, 1372-74 (7th Cir. 1989); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Damiano v. Matish*, 830 F.2d 1363, 1371 (6th Cir. 1987), and cases cited therein.

In Massachusetts, an objecting nonmember employee has the option of having the Commission decide the amount of the agency fee by filing a prohibited practice charge with the Commission, which is what occurred in this case.

We believe that the foregoing provides a dispositive response to the Petition. Nonetheless, in the interests of completeness, we briefly address the two specific legal grounds that petitioners assert in support of their request for review.

A. First, petitioners argue that the court below erred by failing to apply the traditional "least restrictive means" standard when determining the adequacy of the Associations' financial disclosure. Petition at 12-15. However, other than a string citation of cases that was included in the *Hudson* opinion simply to support the proposition that procedures affecting First Amendment rights generally must be "carefully tailored to minimize the infringement" of such rights, *see* 475 U.S. at 303 n.11, petitioners have pointed to nothing in this Court's decision in *Hudson*, or in any other decision, that requires the Associations to meet such a standard.

While establishing a framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that a union operating within this framework must utilize the best possible procedure available. The clear holding of the Court in *Hudson*, repeatedly stated at numerous points in that decision, was only that a union must include in its notice "*an adequate explanation* of the basis for the fee" that would provide nonmember employees with "*sufficient* information to gauge the propriety of the union's fee." *See, e.g.*, 475 U.S. at 306, 307 n.18, 310 (emphasis added).

Indeed, the "least restrictive means" standard proposed by petitioners is incompatible with several specific holdings of this Court in *Hudson*. Thus, the decision in *Hudson* expressly allows a union to calculate the amount of its agency fee with less than absolute precision, *id.* at 307 n.18, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide expeditious arbitrations

with less than full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by objecting nonmember employees while challenges to the fee are pending, *id.* at 310. In these and other areas, the Court plainly refused to impose on a union various procedures that would be "less restrictive" of First Amendment interests, and instead chose to consider the practical burdens that such procedures would impose.

The standard proposed by petitioners is, moreover, flatly inconsistent with the balancing approach that has been established by a long line of decisions of this Court in the context of agency fees, including the Court's opinion in *Hudson* itself. In these decisions, the Court repeatedly has emphasized that a union also has a legitimate and important interest at stake: the right to eliminate free-riders by collecting and expending an objecting nonmember employee's fee for expenses that are related to chargeable activities. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the unions," *Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired," *Railway Clerks v. Allen*, 373 U.S. at 120. The Court in *Hudson* re-emphasized this need to accommodate competing interests when it stated:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*

475 U.S. at 302 (citations omitted) (emphasis added). By insisting that the Association must adopt the "least restrictive means" of collecting agency fees, petitioners completely ignore this latter directive.

In short, to meet constitutional standards, the Associations did not have to provide the best possible financial disclosure, Petition at 14, but rather only had to satisfy the standard set forth in *Hudson*—*i.e.*, that a union must provide nonmembers with "an adequate explanation" of the agency fee that includes "the major categories of expenses, as well as verification by an independent auditor," 475 U.S. at 307 n.18, 310. The informational package provided to nonmember employees in this case—which included the basic financial statements, listing the major categories of the Associations' expenses, that were verified by independent auditors—met this standard.

B. Petitioners also contend that this Court should review the decision of the Supreme Judicial Court of Massachusetts because "[t]he decisions of the lower courts are divided in interpreting what this Court meant when it required a union's agency fee disclosure to be 'verifi[ed] by an independent auditor.'" Petition at 15. Far from being divided, however, every state and federal appellate court that has addressed the issue has rejected the position urged by petitioners in this case. *See Dashiell v. Montgomery County*, 925 F.2d at 758; *Ping v. National Education Ass'n*, 870 F.2d at 1369 (7th Cir. 1989); *Gwirtz v. Ohio Education Ass'n*, 887 F.2d at 682 n.3; *Lehnert v. Ferris Faculty Ass'n, MTA/NEA*, 893 F.2d 111, 112 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2586 (1990); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d at 340; *Antry v. Illinois Educ. Labor Relations Bd.*, 195 Ill. App. 3d 221, 552 N.E.2d 313 (1990), *appeal remanded*, —— N.E.2d —— (Ill. Sept. 13, 1991); *Kuehn v. AFSCME, Council No. 65*, 435 N.W.2d 130 (Minn. App.), *cert. denied*, 493 U.S. 849 (1989).

The most recent court of appeals decision on the point—*Dashiell, supra*—emphasized this unanimity when, in rejecting the nonmember employees' plea that "we also require the auditor to review the Union's initial position taken in attributing expenses to be charged," it declared

that "[w]e, therefore, join the decisions in the Second, Sixth, and Seventh Circuits, which reach the same conclusion." 925 F.2d at 757.

Against this body of consistent appellate court precedent, petitioners cite two district court decisions—*Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989), *aff'd in part, vacated in part*, —— F.2d ——, 1991 WL 315,735 (3d Cir. 1992), and *Mitchell v. Los Angeles Unified School District*, 739 F. Supp. 511, *further proceedings*, 744 F. Supp. 938 (C.D. Cal. 1990), *appeal pending*, Ninth Cir. Nos. 90-56180 & 90-56337.[9] But a conflict between decisions of the courts of appeals and district courts is insufficient by itself to warrant the grant of certiorari under Rule 10 of the Supreme Court Rules. It is the function of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts. The purpose of certiorari, as this Court recently explained, "is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, —— U.S. ——, 111 S. Ct. 1854, 1857 (1991). As we have shown, there is no such conflict as to the Question Presented by the Petition.

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[9] Although both *Mitchell* and *Hohe* were appealed, in neither case was the auditor verification issue raised on appeal. *Mitchell* is now pending before the Ninth Circuit. *Hohe* was decided by the Third Circuit on February 10, 1992, and the court made the following comment with regard to the point at issue:

> [The union] has not appealed the district court's ruling that the independent auditor must verify the breakdown of chargeable and nonchargeable fees [at the explanation stage], and thus we have no reason to review that determination. —— F.2d —— n.9., 1991 WL 315,735, at *18 n.9.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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